IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID LANE JOHNSON,	:	Case No. 5:17-cv-00047-SL
Plaintiff,	:	Judge Sara Lioi
v.	:	
NFLPA, et al.,	:	
Defendants.	:	

Plaintiff David Lane Johnson's Memorandum in Opposition to Defendant NFLPA's Motion to Dismiss[1]

[1] The Court's February 16, 2017 Order (Doc. No. 42) allows Defendants to supplement their pending motions. If Defendant National Football League Players Association ("NFLPA") opts not to do so, however, Plaintiff David Lane Johnson timely files this Opposition to the NFLPA's Motion to Dismiss (Doc. No. 26). To the extent this Memorandum in Opposition does not comport with the Court's Order (Doc. No. 42), Johnson requests leave to file same such that he have an opportunity to oppose the NFLPA's Motion to Dismiss.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES v

INTRODUCTION 1

BACKGROUND 1

SUMMARY OF THE ARGUMENT 2

LAW AND ARGUMENT 3

I. THE NFLPA'S MOTION TO DISMISS UNDER RULE 12(b)(1) SHOULD BE DENIED, AS JOHNSON SUFFICIENTLY PLED STANDING. 3

A. Standard of Review 3

B. Johnson's Pleadings Establish Standing 4

1. Johnson Suffered Injury in Fact 5

2. Johnson's Injuries Are Traceable to the NFLPA's Misconduct 5

II. THE NFLPA'S MOTION TO DISMISS UNDER RULE 12(b)(6) SHOULD BE DENIED, AS JOHNSON STATES CLAIMS AGAINST THE NFLPA 8

A. Standard of Review 8

B. Johnson's Averments Support His Claims against the NFLPA 9

1. Johnson Stated a DFR Claim 9

a. The NFLPA's DFR is Equal to the Scope of Its Authority 9

b. The NFLPA's DFR to a Member Appealing Discipline 11

c. Johnson Stated a DFR Claim 12

2. Johnson Stated a LMRDA Claim 14

3. Johnson Stated a Declaratory Judgment Act Claim 15

III. THIS COURT HAS PERSONAL JURISDICTION OVER THE NFLPA, AND VENUE IS PROPER 15

A. This Court Has Personal Jurisdiction over the NFLPA 16

B. Venue is Proper 19

CONCLUSION 20

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1 21

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Cases

Airline Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65 (1991).....9, 10
Amer. Canoe Assoc. v. City of Louisa Water & Sewer Comm., 389 F.3d 536 (6th Cir. 2004).....6
Ashcroft v. Iqbal, 556 U.S. 662 (2009).....2, 3, 8, 9
Auto Workers Local 909, 325 NLRB 859 (1998).....11
Balowski v. Int'l Union, United Auto, 372 F.2d 829 (6th Cir. 1967).....10
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).....2, 3, 8, 9
Bird v. Parsons, 289 F.3d 865 (6th Cir. 2002).....17
Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573 (6th Cir. 1994).....5, 10, 11, 12
Breininger v. Sheet Metal Workers Int'l Assoc., 493 U.S. 67 (1989).....9, 10
Bruno v. Unt'd Steelworkers of America, 784 F.Supp. 1286 (N.D. Ohio 1992).....3
Caravan Knight Facilities Mgmt., Inc., 362 NLRB No. 196 (Aug. 27, 2015).....11
Carpenters Local 35, 317 NLRB 18 (1995).....11
Cent. Transp., Inc. v. Four Phase Sys., Inc., 936 F.2d 256 (6th Cir. 1991).....7
Chapman v. UAW Local 1005, 670 F.3d 677 (6th Cir. 2012).....14
Commercial Money Ctr., Inc., No. 1:02CV16000, 2011 U.S. Dist. LEXIS 64342 (N.D. Ohio June 17, 2011).....20
Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., Inc., 529 U.S. 193 (2000).....19
DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983).....10
Delorean Motor Co. v. Allard, 991 F.2d 1236 (6th Cir. 1993).....8
Devore v. LS-Royce Energy Sys., 373 F.Supp. 2d 750 (S.D. Ohio 2005).....3
Driver v. U.S. Postal Serv., 328 F.3d 863 (6th Cir. 2003).....10, 11, 12
Dushaw v. Roadway Express, Inc., 66 F.3d 129 (6th Cir. 1995).....5, 12
Fieger v. Ferry, 471 F.3d 637 (6th Cir. 2006).....15
Galaria v. Nationwide Mut. Ins. Co., Nos. 15-3386/3387, 2016 U.S. App. LEXIS 16840 (6th Cir. Sep. 12, 2016).....3, 4
Garrision v. Cassens Trans. Co., 334 F.3d 528 (6th Cir. 2003).....6
Grand Trunk W. R.R. Inc. v. Bhd. of Maint. of Way Emples. Div., 643 F. Supp. 2d 941 (N.D. Ohio 2009).....15
Groves-Granite, 229 NLRB 56 (1977).....11
Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).....17
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).....7, 9, 10
Int'l Ass'n of Machinists and Aerospace Workers, Progressive Lodge No. 1000 v. General Electric Co., 865 F.2d 902 (7th Cir. 1989).....7
Int'l Union v. N.L.R.B., Nos. 15-2305/2478, 2016 U.S. App. LEXIS 22913 (6th Cir. Dec. 21, 2016).....11
Int'l Union, U.A.W. v. Alum. Co. of America, 875 F. Supp. 430 (N.D. Ohio 1995).....19

J4 Promotions, Inc. v. Splash Dogs, LLC, No. 08-cv-977, 2009 U.S. Dist. LEXIS 11023 (N.D. Ohio Feb. 13, 2009) 16
Kauffman Racing Equipment, LLC v. Roberts, 126 Ohio St.3d 81, 2010-Ohio-2551 17
Keener v Nat'l Nurses Organizing Cmte, 615 Fed. App'x. 246 (6th Cir. 2015) 3
Kroger Co. v. Merrill, No. 1:09-CV-722, 2009 U.S. Dist. LEXIS 58254 (N.D. Ohio July 9, 2009) 20
Law Enf't & Scrt'y Offs. Local 40B, 260 NLRB 419 (1982) 12
Letter Carriers Branch 529, 319 NLRB 879 (1995) 11
Letter Carriers Local 3825, 333 NLRB 343 (2001) 11
Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014) 4
Linton v. UPS., 15 F.3d 1365 (6th Cir. 1994) 11
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3
Berman v. Arlington Bank, No. 4:12 CV 2888, 2013 U.S. Dist. LEXIS 24523 (N.D. Ohio Feb. 22, 2013) 19
Marlite, Inc. v. America Canas, No. 5:09CV1401, 2009 U.S. Dist. LEXIS 130484 (N.D. Ohio Aug. 6, 2009) 17
Milstead v. Int'l Bhd. of Teamsters, 580 F.2d 232 (6th Cir. 1978) 11, 12
Nat'l Assoc. of Letter Carriers, 328 NLRB 952 (1999) 11
Parsons v. U.S. Dep't of Justice, 801 F.3d 701 (6th Cir. 2015) 4
Poole v. Budd, Co., 706 F.2d 181 (6th Cir. 1983) 6
Pratt v. UAW, Local 1435, 939 F.2d 385 (6th Cir. 1991) 9
Preferred Capital, Inc. v. Assocs. in Urology, 453 F.3d 718 (6th Cir. 2006) 16
Prouse, Dash & Crouch, L.L.P. v. Dimarco, 116 Ohio St.3d 167, 2007-Ohio-5753 16
Rashid v. Comms. Wrk's of America, No. 3:04-cv-291, 2005 U.S. Dist. LEXIS 35534 (S.D. Ohio May 4, 2005) 9
Ruzicka v. General Motors Corp, 649 F.2d 1207 (6th Cir. 1981) 10, 11
Scheuer v. Rhodes, 416 U.S. 232 (1974) 3
Schneider v. Hardesty, 669 F. 3d 693 (6th Cir. 2012) 16
Schoonover v. Consol. Freightways Corp., 147 F.3d 492 (6th Cir. 1998) 6
Sparks v. Abe May Pack'g. Co., No. 88-4002, 1989 U.S. App. LEXIS 13918 (6th Cir. 1989) 12
Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) 3, 4
Summerville v. Local 77, 369 F. Supp. 29 648 (M.D.N.C. 2005) 15
Teamsters Union No. 200, 357 NLRB 1844 (2011) 11
The Tamarkin Co. v. Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 377, No. 4:09-cv-2927, 2010 U.S. Dist. LEXIS 34725 (N.D. Ohio Apr. 8, 2010) 7
Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430 (6th Cir. 2008) 13
Tsegaye v. Amalgamated Transit Union, 1235, 646 Fed. App'x. 449 (6th Cir. 2016) 10, 11

United States of America v. Ritchie, 15 F.3d 592 (6th Cir. 1994) 3
Unt'd Steelworkers of Am. V. Enter. Wheel & Car Corp., 363 U.S. 593 (1960) 14
USPS, 362 NLRB No. 103 (May 29, 2015).....11
Vaca v. Sipes, 386 U.S. 171 (1967) 9, 10
Veteran Payments Sys., LLC v. Gossage, No. 5:14cv981, 2015 U.S. Dist. LEXIS 16261 (N.D. Ohio Feb. 10, 2015) 16
Weber v. National Football League, 112 F. Supp. 2d 667 (N.D. Ohio 2000).....17
White v. Motor Freight, Inc., 899 F.2d 555 (6th Cir. 1990) 9, 12
Wood v. Int'l Bhd. of Teamsters Local 406, 807 F.2d 493 (6th Cir. 1986) 3, 4, 12
Wuliger v. Mfrs. Life Ins. Co., 567 F.3d 787 (6th Cir. 2009) 4

Statutes

28 U.S.C. § 1391..... 2
28 U.S.C. § 1404(a) 15
28 U.S.C. § 2201..... 19
29 U.S.C. § 185(a) 19
29 U.S.C. § 412..... 19
29 U.S.C. § 414..... 14
Ohio Rev. Code. § 2307.382(A) 18

Rules

Fed. R. Civ. P. 8(a)(2)..... 8

STATEMENT OF THE ISSUES

ISSUE 1: Does David Lane Johnson have standing for his claims against the National Football League Players Association?

ISSUE 2: Has David Lane Johnson stated a duty of fair representation claim, a Labor-Management Reporting and Disclosure Act claim, and a Declaratory Judgment Act claim against the National Football League Players Association?

ISSUE 3: Has David Lane Johnson made out a *prima facie* case that this Court has personal jurisdiction over the National Football League Players Association?

ISSUE 4: Has David Lane Johnson made out a *prima facie* case that venue is proper in this District?

INTRODUCTION

Given its egregious conduct, it is no surprise Defendant NFLPA continues to postpone litigating the merits underlying Plaintiff David Lane Johnson's claims. Johnson's original 45-page Complaint (Doc. No. 1) exceeded the pleading-stage requirements for standing and justiciability to defeat the NFLPA's present Motion to Dismiss (Doc. No. 26). To remove any doubt that his claims are properly before this Court, Johnson filed his Amended Complaint (Doc. No. 39).[1] For the reasons set forth herein, the NFLPA's Motion to Dismiss should be denied.

BACKGROUND

Johnson is a National Football League ("NFL") player. Doc. No. 39 at 1726, ¶ 1. In 2016, he was disciplined under the NFL Policy on Performance-Enhancing Substances ("Policy"). Doc. No. 39 at 1738, ¶ 56. The NFLPA is Johnson's exclusive bargaining representative and collectively bargained the Policy with Defendant National Football League Management Council ("NFLMC"). Doc. No. 39 at 1733, 1784. The Policy guarantees a "fair system of adjudication" and "transparency" in its procedures, scientific methodologies, appeal process, and basis of discipline. Doc. No. 39 at 1733, ¶ 26.

Johnson appealed his 2016 discipline, which appeal ended in the erroneous arbitration award ("Award") Johnson now seeks to vacate. Johnson pled specific facts demonstrating that the NFLPA, by its attorneys, undermined his discipline appeal, including, but not limited to:

- For years, ignoring and failing to enforce express terms of the Policy to the detriment of Johnson and the NFLPA's membership;
- Entering into or allowing multiple, substantive deviations from express Policy terms without providing notice to or obtaining the approval of its membership in violation of the NFLPA Constitution;
- Attempting to dissuade Johnson from appealing his discipline based on a false "strict liability" interpretation of the Policy;

[1] The Committee Notes related to the 2009 Amendment to Rule 15(a)(1), promotes the filing of amended complaints stating that a "responsive amendment [to a 12(b) motion] may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim."

- Failing to investigate the basis for Johnson's discipline;
- Refusing Johnson's repeated requests for information vital to his appeal; and
- Sitting silently for hours during all hearings, despite prior pledges of assistance and direct representations to Johnson that his discipline violated the Policy.

Doc. No. 39 at 1770-1772. Perhaps most egregiously, the NFLPA would not provide Johnson the complete Policy making it impossible for him to fully assert his rights or defend himself. Doc. No. 39 at 1771, ¶ 287. The NFLPA's actions voided the Policy's fairness and transparency guarantees and Johnson's rights.

SUMMARY OF THE ARGUMENT

Johnson's 57-page Amended Complaint far exceeds the *Twombly* and *Iqbal* requirements and defeats the NFLPA's Motion to Dismiss. Johnson stated ample grounds for each of his claims against the NFLPA. To support his duty of fair representation ("DFR") claim, Johnson avers that the NFLPA allowed or engaged in many deviations from express Policy terms without ratification, refused to provide Policy terms to Johnson, did not investigate Johnson's discipline, and refused Johnson's requests for information vital to his appeal. As to Johnson's Labor-Management Reporting and Disclosure Act ("LMRDA") claim, he alleges the NFLPA refused to provide him a complete copy of the Policy. Concerning the Declaratory Judgment claim, Johnson avers ongoing harm the NFLPA caused. Johnson's prayer for relief details the significant and continuing damages the NFLPA's actions caused.

This Court has personal jurisdiction over the NFLPA for three separate reasons -- (1) the NFLPA is an Ohio resident; (2) general jurisdiction exists based on the NFLPA's continuous and systematic contacts with this District; and (3) specific jurisdiction exists, as Johnson's claims arise, in part, based on the NFLPA's conduct in this District.

Venue is proper under the statutes at issue and 28 U.S.C. § 1391. Johnson may bring a DFR claim against the NFLPA wherever it represents its members. The NFLPA admitted it

represents members in this District. Further, all Defendants are residents of Ohio and a substantial part of the events giving rise to Johnson's claims occurred in Ohio.

Johnson respectfully requests that this Court deny the NFLPA's Motion to Dismiss.

LAW AND ARGUMENT

I. THE NFLPA'S MOTION TO DISMISS UNDER RULE 12(b)(1) SHOULD BE DENIED, AS JOHNSON SUFFICIENTLY PLED STANDING

A. Standard of Review

When analyzing a facial attack on a plaintiff's standing, a court "must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party." *United States of America v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994) (*citing Scheuer v. Rhodes*, 416 U.S. 232, 235-37 (1974)); *see also Keener v Nat'l Nurses Organizing Cmte*, 615 Fed. App'x. 246, 248 (6th Cir. 2015) ("[b]ecause this appeal arises from motions attacking [plaintiffs'] pleadings, we presume the truth of the…factual allegations and review the pleadings under the plausibility standard set forth in *Twombly* and *Iqbal"*).

To demonstrate standing, Johnson must show he has: (1) suffered injury in fact; (2) that is fairly traceable to the challenged conduct; and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).[2] Johnson's must assert "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim

[2] The NFLPA improperly cites to JNOV and summary judgment decisions for the standard. See Doc. No. 26-1 at 833, which cites: *Wood v. Int'l Bhd. of Teamsters Local 406*, 807 F.2d 493 (6th Cir. 1986) (JNOV motion); *Bruno v. Unt'd Steelworkers of America*, 784 F.Supp. 1286 (N.D. Ohio 1992) (Rule 56 motion); and *Devore v. LS-Royce Energy Sys.*, 373 F.Supp. 2d 750 (S.D. Ohio 2005) (Rule 56 motion). However, this case is in the pleading stage and only requires each element of standing "be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Galaria v. Nationwide Mut. Ins. Co.*, Nos. 15-3386/3387, 2016 U.S. App. LEXIS 16840, at *8 (6th Cir. Sep. 12, 2016) (*quoting Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir. 2014)). Unreported decisions cited herein are attached as Exhibit 1 in alphabetical order.

has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

A party establishes "injury in fact," the "first and foremost of standing's three elements," by demonstrating "an invasion of a legally protected interest" that is "concrete and particularized." *Spokeo*, 136 S. Ct. at 1547-48. A "particularized" injury affects a party in a "personal and individual" way. *Id*. A "concrete" injury actually exists and is not abstract. *Id*. "Concrete" is not synonymous with "tangible" and "intangible injuries" (e.g., the "violation of procedural rights") can be concrete. *Id*. at 1549.

Second, a party's injury must be "fairly traceable" to the defendant's alleged conduct. *Galaria*, 2016 U.S. App. LEXIS 16840 at *14. At the pleading stage, the issue is not whether the defendant "caused" the plaintiff's injury, as "causation to support standing is not synonymous with causation sufficient to support a claim." *Id*. (*citing Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 796 (6th Cir. 2009); *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 713 (6th Cir. 2015)). "***Proximate causation is not a requirement of Article III standing as a matter of course***." *Galaria*, 2016 U.S. App. LEXIS 16840 at *14 (*citing Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391, fn. 6, (2014)) (emphasis added).

Finally, a party must show his injuries "will likely be redressed by a favorable decision." Where a plaintiff seeks compensatory damages for his injuries, a favorable verdict provides redress. *Galaria*, 2016 U.S. App. LEXIS 16840 at *16.

B. Johnson's Pleadings Establish Standing

Notwithstanding the NFLPA's assertion that "but for" is the standard of review for its Rule 12(b)(1) Motion,[3] as detailed above, the standard is whether Johnson pled injury in fact,

[3]In *Wood v. Int'l Bhd. of Teamsters Local 406*, 807 F.2d 493 (6th Cir. 1986), upon which the NFLPA relies, the Sixth Circuit explained that, to survive a Rule 50 motion in a duty of fair representation action, plaintiff needed to

"fairly traceable" to the NFLPA's conduct, that is likely to be redressed by a favorable judicial decision. Johnson's Amended Complaint exceeds all three standing requirements.[4]

1. Johnson Suffered Injury in Fact

The NFLPA does not dispute Johnson's claimed injuries, but wrongly identifies them as only suspension and associated loss of pay. Doc. No. 26-1 at 831. Johnson's injuries are asserted in his prayer for relief, including: the loss of pay and bonuses from the erroneous Award; improper continuation in the reasonable cause testing program; improper placement at an elevated stage of Policy discipline; forfeiture of contractual guarantees; and costs and fees associated with his discipline appeal and with this action. Doc. 39 at 1779.

2. Johnson's Injuries Are Traceable to the NFLPA's Misconduct

The following chart traces the NFLPA's misconduct to Johnson's injuries:

The NFLPA's Misconduct	Resulting Injury to Johnson
Refused to support Johnson's efforts to obtain the Policy-required lab testing protocols applicable to Johnson's tests. Doc. No. 39 at 1749, 1771, ¶¶ 119, 287.	Absent the protocols, Johnson could not confirm whether the lab followed them.[5]
Ignored express Policy terms regarding arbitrator selection, assignment, and competence. Doc. No. 39 at 1749, ¶¶ 116-118.	Denied Johnson a properly appointed and seated arbitrator.
Refused to provide the alleged "side agreement" relating to the Chief Forensic Toxicologist ("CFT"), failed to ratify or notify its members of such an agreement.[6] Doc. No. 39 at 1746, 1749, 1751, ¶¶ 98, 120, 134.	There can be no positive test and no valid discipline absent certification of the test results by the CFT.

demonstrate that "but for" the union's breach of its duty, the arbitration of plaintiff's claims would have come out differently. *Id*. at 500. Yet, subsequent decisions of the Sixth Circuit cite *Wood* for the principle that in asserting a DFR claim, a plaintiff must demonstrate that the union's breach more than likely contributed to or tainted the erroneous arbitration decision. *See Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994); *Dushaw v. Roadway Express, Inc.*, 66 F.3d 129, 132 (6th Cir. 1995).

[4] The NFLPA does not contest that a favorable judicial decision could redress Johnson's injuries.

[5] Johnson has reason to believe the lab did not the protocols, including, but not limited to: the destruction of his specimen in violation of the Policy. Additionally, other players have successfully appealed discipline based on deviations in the collection procedures. *See*, e.g., Richard Sherman (http://www.usatoday.com/story/sports/nfl/seahawks/2012/12/27/richard-sherman-seattle-seahawks-nfl-suspension/1794143/) (last visited 2/27/2017).

[6] In its Motion to Dismiss, the NFLPA refers to a "side agreement" with the NFLMC regarding the Director of the UCLA Olympic Testing Laboratory fulfilling the duties of the CFT, but failed to attach this side agreement to its

The NFLPA's Misconduct	Resulting Injury to Johnson
Did not enforce the "neutral and independent" status of its agent the Independent Administrator, including refusing to obtain documents critical to Johnson's appeal from the Independent Administrator. Doc. No. 39 at 1751, ¶¶ 133-134.	Without access to documents maintained by the Independent Administrator, Johnson was unable to evaluate or support his defenses or rebut documents relied on by the NFLMC to support the discipline (including but not limited to Exhibit I at his appeal).
Privately advised Johnson it felt the Independent Administrator retained him in the Policy's reasonable cause testing program in violation of the Policy, but refused to voice that position on the record. Doc. No. 39 at 1752, ¶ 141.	The NFLPA's silence before the arbitrator enabled the NFLMC to assert that the reasonable cause testing program was amended and that the NFLPA endorsed the discipline.
Refused to assert Johnson's appeal rights when its lawyer told him the Policy was "strict liability" and appealing would be like "burning money." Doc. No. 39 at 1750, ¶¶ 127-128.	Johnson had to retain outside counsel to assert his rights and only after he conducted his own investigation did an NFLPA attorney admit the merits of his defenses.
Failed to seek approval from its membership, as required by its Constitution, to modify the Policy. Doc. No. 39 at 1748-49, ¶¶ 111-22.	As part of Johnson's discipline, the NFLPA allowed the NFL to enforce unapproved modifications to the Policy against Johnson.

Johnson also suffered other significant injuries bourn of the NFLPA's misconduct, executed by its attorneys,[7] which contributed to the erroneous Award. Much of the NFLPA's misconduct relates to its refusal to provide information. The NFLPA refused to produce alleged modifications to the Policy in violation of the LMRDA and did not seek approval of said modifications in violation of its Constitution. Doc. No. 39 at 1748-49, ¶¶ 111-122. Failure to provide information where such is statutorily required confers standing. *Amer. Canoe Assoc. v. City of Louisa Water & Sewer Comm.*, 389 F.3d 536, 546 (6th Cir. 2004). The NFLPA refused to provide Johnson with information *because he had appealed* and left him to face the NFLMC's

Motion. Doc. No. 26-1 at 841. Johnson repeatedly sought this document. Whether such a "side agreement" exists or not, the NFLPA had to submit it and any Policy amendments to its Board of Representatives for approval but, in violation of its own Constitution did not do so. Doc. No. 39 at 1748-1749, ¶¶ 111-122.

[7] When reviewing a union's acts or omissions, courts weigh whether the union's agents are lawyers. *Garrision v. Cassens Trans. Co.*, 334 F.3d 528, 539 (6th Cir. 2003) (*citing Schoonover v. Consol. Freightways Corp.*, 147 F.3d 492, 497 (6th Cir. 1998)); *Poole v. Budd, Co.*, 706 F.2d 181, 185 (6th Cir. 1983) (non-lawyer union representatives not held to the higher standard expected of attorneys). In this matter, NFLPA attorneys acted for the NFLPA.

refusal to provide information alone.[8] The NFLPA's denial of vital information denied Johnson express Policy defenses.

Only through mischaracterizations of the law, can the NFLPA support its Rule 12(b)(1) arguments. First, the NFLPA asserts that Johnson's DFR claims fail because the arbitrator rejected Johnson's arguments regarding deviations from express Policy terms and that the erroneous Award vindicates its actions and omissions, but the NFLPA fails to address how its misconduct tainted the Award.[9] Doc. 26-1 at 835. The NFLPA cannot rely on the tainted Award given Johnson's allegations against the arbitrator, the NFLMC, and the NFLPA. *See*, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976); Doc. No. 39 at 1760-1768, ¶¶ 202-63.

Johnson raised the issues of arbitrator selection, the failure to select a minimum of three arbitrators, and the arbitrator assignment during his appeal and requested information from the NFLMC regarding each issue. Doc. No. 3-5 at 337-338. Johnson also argued for that information in the first arbitration hearing and incorporated his arguments in his appeal. Doc. No. 3-7 at 346, 352-353. *See The Tamarkin Co. v. Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 377*, No. 4:09-cv-2927, 2010 U.S. Dist. LEXIS 34725, at *24-*27 (N.D. Ohio Apr. 8, 2010) (Lioi, J.) (a party did not waive objection to arbitrator selection where it objected during the process).[10] Johnson did not "choose" not to pursue the arbitrator issue, the

[8] As Johnson avers, the NFLPA refused to provide vital information to him and directed him to obtain the information from the NFLMC. The NFLMC refused to provide critical information Johnson requested and the arbitrator largely sustained the NFLMC's refusals. When the arbitrator ordered the NFLMC to produce laboratory protocols, the NFLMC first denied such documents existed and then falsely insisted it had produced them. Doc. No. 39 at 1755-1756, ¶¶ 162-164.

[9] The NFLPA's citation to *Cent. Transp., Inc. v. Four Phase Sys., Inc.*, 936 F.2d 256, 260 (6th Cir. 1991) is unavailing. Doc. No. 26-1 at 835. In that case, the Sixth Circuit reviewed a trial court's application of collateral estoppel in granting a Rule 56 motion where the plaintiff brought claims identical to those the plaintiff already arbitrated. Notably, the underlying claims did not attack the validity of the prior arbitration process or award.

[10] *See also Tamarkin*, No. 4:09-cv-2927, Memorandum Opinion and Order, Doc. No. 10 at 178 (N.D. Ohio Dec. 21, 2009) ("the arbitrator cannot be the judge of his own authority") (*citing Int'l Ass'n of Machinists and Aerospace Workers, Progressive Lodge No. 1000 v. General Electric Co.*, 865 F.2d 902, 904 (7th Cir. 1989)). The *Tamarkin* Memorandum Opinion and Order is attached as Exhibit 2.

NFLPA's and the NFLMC's refusal to provide information and the Arbitrator's order prohibiting discovery on the issue denied him that option. Doc. 3-8 at 371.

The averments demonstrate that the NFLPA disregarded express Policy terms guaranteeing Johnson's rights through alleged "amendments" implemented without its members' approval, as its Constitution required. As Johnson appealed the discipline, the NFLPA aided the NFLMC's deviation from express Policy terms. The NFLPA denied Johnson vital information for his defense. The NFLPA's actions and omissions struck at the heart of the Policy's guarantee of transparency and fair adjudication. The NFLPA's breaches of its DFR denied an appropriate arbitrator a complete record and unfairly foisted upon the proceeding an erroneous version of the Policy's terms. Thus, Johnson's pleadings demonstrate that the NFLPA's misconduct more likely than not tainted and contributed to the erroneous Award.

II. THE NFLPA'S MOTION TO DISMISS UNDER RULE 12(b)(6) SHOULD BE DENIED, AS JOHNSON STATES CLAIMS AGAINST THE NFLPA

A. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (2009) (*quoting Twombly*, 550 U.S. at 570). When considering a motion under Rule 12(b)(6), a court must construe the averments in the light most favorable to plaintiff, accept all factual allegations as true, and determine whether plaintiff can prove no set of facts in support of his claims entitling him to relief. *Delorean Motor Co. v. Allard*, 991 F.2d 1236, 1240 (6th Cir. 1993). A court may not grant the motion on a disbelief of the factual allegations. *Id.*

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). This pleading standard does not require great detail, but the factual allegations in the complaint "must be enough to raise a right to relief

above the speculative level." *Twombly*, 550 U.S. at 555. "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 556. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

B. Johnson's Averments Support His Claims against the NFLPA

1. Johnson Stated a DFR Claim

a. The NFLPA's DFR is Equal to the Scope of Its Authority

A union's "broad authority in negotiating and administering" is not "unlimited." *Hines*, 424 U.S. at 564. The DFR is "equal in scope to [the union's] authority." *Id*. at 564. "[J]ust as … fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith." *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 75 (1991). A union must "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with ***complete good faith and honesty***, and to avoid arbitrary conduct." *Id*. at 76 (emphasis added).

The DFR applies to "all" union activities. "[T]he *Vaca v. Sipes* standard applies to challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." *O'Neill*, 499 U.S. at 77; *see also Breininger v. Sheet Metal Workers Int'l Assoc.*, 493 U.S. 67, 89 (1989) (if a union wields additional power "its responsibility to exercise that power fairly *increases* rather than *decreases*").

Claims for a DFR breach do not *require* a contract breach claim against the employer. *Rashid v. Comms. Wrk's of America*, No. 3:04-cv-291, 2005 U.S. Dist. LEXIS 35534 at *10 (S.D. Ohio May 4, 2005) (*citing Pratt v. UAW, Local 1435*, 939 F.2d 385, 388 (6th Cir. 1991)); *see also White v. Motor Freight, Inc.*, 899 F.2d 555, 561 (6th Cir. 1990) (union misrepresentation

of the facts underlying an agreement is actionable absent a breach-of-contract claim against employer); *Breininger* 493 U.S. at 83 (jurisdiction over DFR suits without employer claims).

By contrast, a "hybrid" Section 301 claim includes two "constituent" claims: an employer's breach of the labor contract and a union's DFR breach. *Black*, 15 F.3d at 584 (6th Cir. 1994) (*citing DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 162 (1983)). To recover on a hybrid claim, plaintiff must show the employer breached the contract and the union breached its DFR. *Id*. A union's DFR breach relieves an employee of requirements to settle disputes through arbitration. *Hines*, 424 U.S. at 567. If the breach "seriously undermines the integrity of the arbitral process," an arbitration award is not binding, whether the union subverts the process by refusing to arbitrate or by failing to fairly represent the employee. *Id*. at 567, 572.

In all cases, a union breaches its DFR if its *actions or omissions* are "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Tsegaye v. Amalgamated Transit Union, 1235*, 646 Fed. App'x. 449, 452 (6th Cir. 2016). Thus, there are "three separate and distinct possible routes by which a union may be found to have breached its duty." *Driver v. U.S. Postal Serv.*, 328 F.3d 863, 868 (6th Cir. 2003). Whether a union has acted "fairly, impartially and without hostile discrimination depends on the facts of each case." *Balowski v. Int'l Union, United Auto*, 372 F.2d 829, 834 (6th Cir. 1967).

Union actions are arbitrary if "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 499 U.S. at 67. An "arbitrary" decision "arises from caprice or is without reason." *Ruzicka v. General Motors Corp*, 649 F.2d 1207, 1211, fn. 3 (6th Cir. 1981). A union must have a "rational basis" for making representational decisions. *Tsegaye*, 646 Fed. App'x. at 453. Arbitrary or discriminatory action need not be motivated by bad faith to violate the DFR.

Ruzica v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975). But, a union acts in bad faith when it "acts with an improper intent, purpose, or motive … encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Int'l Union v. N.L.R.B.*, Nos. 15-2305/2478, 2016 U.S. App. LEXIS 22913, at *28 (6th Cir. Dec. 21, 2016).

b. The NFLPA's DFR to a Member Appealing Discipline

The DFR requires a reasonable, independent investigation of employee discipline. *Black,* 15 F.3d at 584-585 (*citing Hines,* 424 U.S. 554 (1976)); *Driver*, 328 F.3d at 869. While not required to exhaust every option, a union that fails to produce available favorable evidence violates its DFR. *Black,* 15 F.3d at 585. A union's investigation cannot be "perfunctory." *Tsegaye*, 646 Fed. App'x. at 453; *see also Milstead v. Int'l Bhd. of Teamsters*, 580 F.2d 232, 235 (6th Cir. 1978) ("***[i]n some instances, it is necessary only to show that the union has processed a grievance in a perfunctory fashion***"). Neither can a union handle a grievance with "caprice or without rational explanation." *Linton v. UPS.*, 15 F.3d 1365, 1370 (6th Cir. 1994). Union ignorance of the contract terms also breaches the DFR. *Milstead*, 580 F.2d at 236.

"[A]n act or failure to act on the part of the union may be egregious (more than just negligent) so as to constitute arbitrary conduct ***for failure to transmit vital information to the grievant***."[11] *Sparks v. Abe May Pack'g. Co.*, No. 88-4002, 1989 U.S. App. LEXIS 13918, at *9

[11] The National Labor Relations Board ("NLRB") has long held that unions breach the DFR and violate Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA"), by refusing members discipline related information. *Caravan Knight Facilities Mgmt., Inc.*, 362 NLRB No. 196, slip op. at 5-6 (Aug. 27, 2015) (failed to provide a union representative statement); *USPS*, 362 NLRB No. 103, slip op. at 6 (May 29, 2015) (failed to provide the contract); *Teamsters Union No. 200*, 357 NLRB 1844, 1862 (2011); *Letter Carriers Local 3825*, 333 NLRB 343, 353 (2001) (failed to provide other employee grievances documents); *Nat'l Assoc. of Letter Carriers*, 328 NLRB 952, 952 (1999) (failed to provide employee grievance file); *Letter Carriers Branch 529*, 319 NLRB 879, 881-82 (1995) (failed to provide grievance file); and *Carpenters Local 35*, 317 NLRB 18,19-22 (1995) (failed to provide job referral documents because employee had filed a grievance).

Unions may not "purposely keep employees uninformed or misinformed concerning their grievances." *Groves-Granite*, 229 NLRB 56, 63 (1977). When a union does not disclose "requested information to its constituency, …[it] breaches its representational duties." *Auto Workers Local 909*, 325 NLRB 859, 865 (1998). Denying members "the opportunity to examine its agreement with their employer … severely limits the employees' ability to

(6th Cir. 1989) (emphasis added); *see also Driver*, 328 F.3d at 869 (refusal to contact a witness at a member's request); *Black*, 15 F.3d at 585 (refusal to call a witness); *Milstead*, 580 F.2d at 236 (not informing a member of relevant agreements with the employer).

If a union's breach "taints," "contributes to" or "more than likely affects the outcome of" an arbitration award, an employee has grounds for DFR claims. *Black*, 15 F.3d at 585 (plaintiff needs to show the union's breach "tainted the decision.") (*citing Wood*, 807 F.2d at 500);[12] *White*, 899 F.2d at 560 (the "ultimate issue" with respect to the claim against the union in a hybrid 301 case is whether the alleged breach "contributed to the arbitrator's making an erroneous decision") (*citing Wood*, 807 F.2d at 500); *Dushaw*, 66 F.3d at 132 ("the plaintiff must also prove that the Union's actions tainted the grievance procedure such that the outcome was more than likely affected by the Union's breach").

c. Johnson Stated a DFR Claim

Johnson avers, with great specificity, multiple times the NFLPA violated its DFR, from Policy "amendments" in violation of its Constitution, to conducting no investigation, and not providing Johnson vital information. The NFLPA does not deny the misconduct Johnson alleges and this Court must take as true Johnson's averments that the NFLPA: improperly amended, ignored and/or did not enforce the Policy's arbitrator and CFT requirements; ignored and did not enforce the Policy's reasonable cause testing terms; refused to provide Johnson with the complete Policy; and denied Johnson's requests for information in its or its agents' possession.

---

determine whether they have been afforded the fair representation that is their due." *Law Enf't & Scrt'y Offs. Local 40B*, 260 NLRB 419, 420 (1982). While the NLRB has exclusive jurisdiction to hear unfair labor practice claims under the NLRA, federal courts have concurrent jurisdiction to hear DFR claims. *Keener*, 615 Fed. App'x. at 248.

[12] The NFLPA's cite to *Wood* (Doc. No. 26-1 at 833), but fails to note that the Sixth Circuit issued its decision after review of the district court's decision to grant a Rule 50 motion after a jury trial, and, as a result, the *Wood* decision was premised on plaintiffs' lack of evidence after presenting its case at trial. *Wood*, 807 F.2d at 498.

Doc. No. 39 at 1746, 1748-53, 1769-1773, ¶¶ 98-99, 111-122, 277-303. The NFLPA refused to provide Johnson information *because* he appealed discipline. Doc. 39 at 1751-52, ¶¶ 130-137.

In each instance, the NFLPA either deviated from or allowed the NFLMC to deviate from express Policy terms. The "deviations" from the collectively bargained Policy, in violation of the NFLPA Constitution, are inherently arbitrary, unreasonable, and smack of bad faith. Johnson requested information regarding the deviations, which the NFLPA refused to provide. The NFLPA's refusal to even inform Johnson of the Policy terms evidences intent to conceal its prior misconduct in allowing implementation of un-ratified "amendments." The NFLPA admitted that Johnson should not have been subject to reasonable cause testing in July 2016. Doc. No. 39 at 1752, ¶ 141. However, its failure to enforce the reasonable cause testing terms and assist Johnson in obtaining his testing history denied him the ability to assert that defense in his appeal.

The NFLPA's conclusory assertions that there are no grounds upon which Johnson can demonstrate retaliation or collusion ring hollow. A review of the hearing transcripts (Doc. No. 3-8 and 3-10) demonstrates that multiple NFLPA attorneys attended each hearing. Not one of them substantively contributed to Johnson's appeal. During the discovery hearing, Johnson explained to the Arbitrator that the NFLPA refused to provide information and told him to get it from the NFLMC. Doc. No. 3-7 at 348-349. The NFLPA's attorneys were silent and neither objected to Johnson's statement nor argued that Johnson should have access to the information.

Johnson's specific allegations demonstrate that the NFLPA breached its DFR by actively facilitating the NFLMC's violations of express Policy terms and then refusing to support Johnson's appeal.[13] As to "retaliation," Johnson pled specific facts demonstrating his public

[13] The NFLPA strains to argue Johnson failed to plead "collusion" and "conspiracy" effectively. Doc. No. 26-1 at 840. One of the decisions the NFLPA cited in support, *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, addressed claims under the Sherman Act, which sets forth very specific pleading requirements regarding conspiracies that are inapplicable here. *Total Benefits*, 552 F.3d 430, 434-438 (6th Cir. 2008).

dispute with the NFLPA regarding its actions. Doc. No. 39 at ¶¶ 123-126. Johnson also averred the NFLMC's communication to the NFLPA regarding the dispute and the NFLMC's invitation to discuss it in the context of Johnson's appeal. Doc. No. 39 ¶¶ 127-129.

The NFLPA strains to persuade this Court by arguing the Award's merits. Doc. No. 26-1 at 827, 834, and 837. The NFLPA's effort fails. First, in actions to vacate arbitration awards, courts may not evaluate the merits of the underlying grievance/arbitration. *Chapman v. UAW Local 1005,* 670 F.3d 677, 681, fn. 1 (6th Cir. 2012) (courts do not "review the merits of an arbitration award" but only determine if the award "draws it essence from the collective bargaining agreement") (*citing Unt'd Steelworkers of Am. V. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960)). Second, under the Policy, the NFLMC bore the burden of demonstrating that the allegedly positive test was "authorized under the Policy" and conducted in accordance with the Collection Protocols. Doc. No. 39 at 1736, ¶40(f). As Johnson pled, the NFLMC did not meet that burden, and, under the Policy, the discipline is invalid.

Johnson has pled specific facts demonstrating the NFLPA repeatedly violated its DFR.

2. Johnson Stated a LMRDA Claim

The LMRDA requires unions:

> to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement.

29 U.S.C. § 414. The NFLPA violated the LMRDA by refusing to provide Johnson a complete copy of the Policy and disciplining him for asserting his rights. *See* Doc. No. 39 at 1773-1774. The NFLPA admitted that it "refused to share with Johnson…purported modifications to the collectively bargained 2015 Policy." Doc. No 26-1 at 18; Doc. No. 39 at 1773, ¶ 308. This alone is a violation of the LMRDA.

The NFLPA miscasts the *Summerville* decision to suggest it was not required to provide Johnson with Policy modifications. In *Summerville*, a union member requested "the Articles that will appear in the new agreement" not the provisions of a labor contract in effect. *Summerville v. Local 77*, 369 F. Supp. 29 648, 653-654 (M.D.N.C. 2005). Here, Johnson claims the NFLPA refused to provide him the terms of the existing Policy. Furthermore, in *Summerville*, the union provided "the Articles" the union member requested. *Id*. at 655.[14] Johnson still does not have a complete copy of the Policy terms. How can Johnson adhere to a policy he does not have?[15]

3. Johnson Stated a Declaratory Judgment Act Claim

Standing under the Declaratory Judgment Act requires a plaintiff to "allege and/or 'demonstrate actual present harm or a significant possibility of future harm.'" *Grand Trunk W. R.R. Inc. v. Bhd. of Maint. of Way Emples. Div.*, 643 F. Supp. 2d 941, 948 (N.D. Ohio 2009) (*citing Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006)). Johnson alleged both. *See* Doc. No. 39 at 1777, ¶¶ 342, 343.[16]

For the foregoing reasons, the NFLPA's Rule 12(b)(6) motion should be denied.

III. THIS COURT HAS PERSONAL JURISDICTION OVER THE NFLPA, AND VENUE IS PROPER

The NFLPA's Rule 12(b)(2) and (b)(3) arguments are unavailing. *See* Doc. No. 26-1 at 845-846. The NFLPA admitted that this Court has personal jurisdiction over it and that this forum is proper. Before filing its Motion to Dismiss, the NFLPA asked the Court to transfer the case under 28 U.S.C. § 1404(a) only and not § 1406. *See* Doc. No. 16. A transfer under §

[14] In the alternative, to the extent the NFLPA suggests it was not required to provide Johnson with the modifications, because they had "not yet been incorporated" into the Policy (Doc. No. 26-1), then the NFLPA admits that the NFLMC enforced invalid Policy provisions to discipline Johnson with the NFLPA's cooperation.

[15] Johnson's LMRDA claim, while related to his other claims, is a stand-alone claim. The harm the NFLPA's violation caused Johnson need not be related to his arbitration to be actionable, as the NFLPA suggests. Doc. No. 26-1 at 845. The NFLPA's LMRDA violation caused, and continues to cause, its own harm.

[16] See also Johnson's Prayer for Relief wherein he claims actual present harm in that the erroneous Award voided his contractually guaranteed money, placed Johnson at an elevated discipline step, and continued his improper inclusion in the reasonable cause testing program. Doc. No. 39 at 1779.

1404(a) is appropriate only where personal jurisdiction and venue are proper, while § 1406 is appropriate where there is no personal jurisdiction. *See Veteran Payments Sys., LLC v. Gossage*, No. 5:14cv981, 2015 U.S. Dist. LEXIS 16261, at *7-8 (N.D. Ohio Feb. 10, 2015) (Lioi, J.). Whether or not the NFLPA's earlier § 1404(a) request admits personal jurisdiction and proper venue, its Rule 12(b)(2) and (b)(3) arguments fail in light of Johnson's Amended Complaint.

A. This Court Has Personal Jurisdiction over the NFLPA

Johnson needs only to make a *prima facie* showing of personal jurisdiction. *J4 Promotions, Inc. v. Splash Dogs, LLC*, No. 08-cv-977, 2009 U.S. Dist. LEXIS 11023, at *13-14 (N.D. Ohio Feb. 13, 2009) (*citing Pref'd Capital, Inc. v. Assocs. in Urology*, 453 F.3d 718, 720 (6th Cir. 2006)). Absent an evidentiary hearing, a court looks only at the nonmoving party's pleadings and affidavits and construes the facts in the light most favorable to the nonmoving party. *Schneider v. Hardesty*, 669 F. 3d 693, 697 (6th Cir. 2012). Johnson's Amended Complaint disposes of the NFLPA's 12(b)(2) argument for three separate reasons.

First, "it is axiomatic that Ohio courts can exercise jurisdiction over a person who is a resident of Ohio." *Prouse, Dash & Crouch, L.L.P. v. Dimarco*, 116 Ohio St.3d 167, 2007-Ohio-5753, ¶ 5. The Amended Complaint avers "[t]he NFLPA resides within and has continuous and systematic contacts with this District." Doc. No. 39 at 1726, ¶ 2. The NFLPA does not address its Ohio residence. For this reason, the Court has personal jurisdiction over the NFLPA.

Second, the NFLPA does not address general jurisdiction as complete grounds for personal jurisdiction, focusing, instead, entirely on specific jurisdiction. *See* Doc. No. 26-1 at 845-846.[17] However, the Ohio Supreme Court instructed that:

> Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state. General jurisdiction is

[17] For a more detailed analysis of personal jurisdiction in Ohio based on general jurisdiction, please see Doc. No. 35 at 1427-1430.

> proper only where a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contact with the state.

Kauffman Racing Equipment, LLC v. Roberts, 126 Ohio St.3d 81, 2010-Ohio-2551, ¶ 46 (*citing Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002)) (internal citations omitted)).[18]

The NFLPA admits it is "an employee organization recognized as the exclusive bargaining representative of professional football players employed by National Football League franchises and ***regularly does business within this District***." *See* Doc. No. 1 at 2, ¶ 2; Doc. No. 28 at 1023, ¶ 2 (emphasis added). The NFLPA's continuous and systematic contact with Ohio arises from the two NFL franchises in Ohio. The NFLPA also admits, "it represents and derives revenue from its professional football player members who perform services within this District" and that "NFLPA members also reside within this District." Doc. No. 28 at 1024, ¶ 10. By its admissions, the NFLPA has continuous and systematic contacts with this District. For this reason, this Court has personal jurisdiction over the NFLPA based on general jurisdiction.[19]

Finally, this Court has personal jurisdiction over the NFLPA because specific jurisdiction exists. Even where a defendant's contacts with Ohio are not "continuous and systematic," personal jurisdiction arises under Ohio's long-arm statute, subject to the Due Process Clause

[18] Like the Ohio Supreme Court, this Court also recognized the existence of personal jurisdiction based on general jurisdiction. *See Marlite, Inc. v. America Canas*, No. 5:09CV1401, 2009 U.S. Dist. LEXIS 130484, at *7 (N.D. Ohio Aug. 6, 2009) (Lioi, J.) (*citing Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)) ("[g]eneral jurisdiction is established by a defendant's 'continuous and systematic' contacts with the forum state").

[19] The NFLPA's citation to *Weber v. National Football League*, 112 F. Supp. 2d 667, 675 (N.D. Ohio 2000) is unavailing. *See* Doc. No. 26-1 at 846. In *Weber*, the court dismissed a nonresident's claims against the NFL under the Sherman Act. *Id*. at 669. In a section entitled "Remaining Claims," the court addressed personal jurisdiction only under the Ohio long-arm statute and concluded that specific personal jurisdiction did not exist. *Id.* at 675. The court did not analyze Ohio general jurisdiction or whether the NFL was a resident of the Ohio.

limits.[20] Under the long-arm statute, a court may exercise personal jurisdiction over nonresidents on claims arising from its Ohio business transactions. Ohio Rev. Code. § 2307.382(A).[21]

The NFLPA summarily states that its Ohio contacts are unrelated to Johnson's claims. Doc. No. 26-1 at 846. In doing so, the NFLPA overlooked the many events in Johnson's Complaint that occurred in Ohio. To focus the NFLPA, Johnson's Amended Complaint identified numerous specific events directly related to his claims that occurred in Ohio:

- The NFLPA provided Johnson with materials concerning performance-enhancing substances at the 2013 Rookie Symposium in this District;
- At least until September 2015, the NFLMC and NFLPA retained Lombardo to administer the 2015 Policy and its successor policies from Ohio;
- At least until September 2015, the NFLMC and the NFLPA paid Lombardo to direct and administer the 2015 Policy and its predecessor policies in Ohio;
- Lombardo placed Johnson in reasonable cause testing from the state of Ohio;
- Lombardo decided to keep Johnson in the reasonable cause testing from Ohio;
- At all times material to the Amended Complaint, Lombardo was the joint agent of the NFLMC and the NFLPA;
- Johnson appealed his discipline under the 2015 Policy from this District;
- Johnson, in this District, sent and received information to and from the NFLMC and NFLPA concerning his appeal;
- The arbitrator held a hearing, in part, in this District on September 22, 2016;
- A court reporter transcribed the September 22, 2016 hearing in this District and indicated that the location of the hearing was within this District; and
- The NFLPA engaged in fraud, dishonesty, and misconduct within this District, providing Johnson with false information concerning his appeal, including, misrepresenting terms of alleged agreements with the NFLMC concerning the 2015 Policy and failing to provide the full terms of the 2015 Policy.

See Doc. No. 39 at 1727-1732, ¶ 16.[22] The NFLPA's Ohio actions relate directly to Johnson's claims. Thus, the Court has personal jurisdiction over the NFLPA, based on specific jurisdiction.

[20] The NFLPA does not argue a lack of Constitutional Due Process.
[21] For a more detailed analysis of personal jurisdiction under Ohio's long-arm statute, see Doc. No. 35 at 1430-1434.
[22] Johnson enumerated many of these same allegations in his original Complaint (Doc. No. 1), without specifically stating they occurred in Ohio.

B. Venue is Proper

In a single paragraph, the NFLPA challenges the venue of Johnson's claims under § 301 of the Labor Management Relations Act ("LMRA"), the Federal Arbitration Act ("FAA"), and 28 U.S.C. § 2201. *See* Doc. No. 26-1 at 846.[23] When a defendant challenges venue, the plaintiff must prove a *prima facie* case that "his chosen venue is proper." *Berman v. Arlington Bank*, No. 4:12 cv 2888, 2013 U.S. Dist. LEXIS 24523, at *19 (N.D. Ohio Feb. 22, 2013) (Lioi, J.). The Court "must draw all reasonable inferences and resolve factual conflicts in favor of the plaintiff." *Id*.

"The requirements for venue are set forth by statute." *Id*. at *20 (citation omitted). Under the LMRA, claims "may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a); Doc. No. 26-1 at 846, fn. 11. As detailed above, this Court has jurisdiction of the parties, thus, venue is proper. Furthermore, "§ 301(c) [of the LMRA] provides for 'venue' in any district where the union represents employees." *Int'l Union, U.A.W. v. Alum. Co. of America*, 875 F. Supp. 430, 432 (N.D. Ohio 1995). The NFLPA admitted its represents players performing services in this District. Doc. No. 1 at 4, ¶ 10; Doc. No. 28 at 1024, ¶ 10). Again, venue is proper.

"The FAA's venue provisions are permissive, allowing a motion to…vacate…to be brought either in the district where the award was made or in any district proper under the general venue statute." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., Inc.*, 529 U.S. 193, syllabus (2000). The general venue statute also applies to a declaratory judgment request.

[23] The NFLPA does not contest venue for Johnson's LMRDA claims. Under the LMRDA, an aggrieved individual may bring an action "against a labor organization…in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located." 29 U.S.C. § 412. The NFLPA admitted its principal location is in Washington, D.C. (Doc. No. 1 at 22, ¶ 2; Doc. No. 28 at 1023, ¶ 2) meaning venue under the LMRDA is proper here because this is "where the alleged violation occurred" as Johnson alleged. *See* Doc. No. 39 at 1731-1732, ¶ 16.dd. Furthermore, that Johnson's LMRDA claims occurred within this District, undermines the NFLPA's 12(b)(2) argument.

As detailed above, the NFLPA is a resident of this District as are the NFL and the NFLMC. *See* Doc. No. 39 at 1726, ¶¶ 3-4; Doc. No. 35 at 1425-1426. As all Defendants are residents of this District, venue is proper under 28 U.S.C. § 1391(b)(1).

Even if the Court finds that Defendants are not residents of this District, venue is proper because "a substantial part of the events or omissions giving rise to" Johnson's claims occurred here. Doc. No. 39 at 1728-32, ¶ 16. 28 U.S.C. § 1391(b)(2). "Generally, 'most courts are quite lenient in finding that a substantial part of the events occurs in a district.'" *Kroger Co. v. Merrill*, No. 1:09-CV-722, 2009 U.S. Dist. LEXIS 58254, at *6 (N.D. Ohio July 9, 2009) (citation omitted); *In re Comm'rl Money Ctr., Inc.*, No. 1:02CV16000, 2011 U.S. Dist. LEXIS 64342, at *14-15 (N.D. Ohio June 17, 2011) (if a substantial part of events occurred in a district, venue "is proper" in that district "even if a majority of events occurred elsewhere"). A substantial part of the events occurred in this District (*see* Doc. No. 39 at 1728-1732, ¶ 16), and venue is proper for this separate reason.

CONCLUSION

For these reasons, Johnson respectfully requests that the Court deny Defendant NFLPA's Motion to Dismiss (Doc. No. 26).

Respectfully submitted,

ZASHIN & RICH CO., L.P.A.

s/ Stephen S. Zashin
Stephen S. Zashin (#0064557) - ssz@zrlaw.com
Patrick J. Hoban (#0079794) - pjh@zrlaw.com
David R. Vance (#0083842) - drv@zrlaw.com
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618

Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned certifies that this matter has yet to be assigned a track and that this Memorandum in Opposition adheres to the 20-page limitation set forth in Local Rule 7.1(f) for unassigned cases. This Memorandum in Opposition also adheres to the page limitations set forth in the Initial Standing Order (Doc. No. 8).

s/ Stephen S. Zashin
Stephen S. Zashin (#0064557) - ssz@zrlaw.com
Patrick J. Hoban (#0079794) - pjh@zrlaw.com
David R. Vance (#0083842) - drv@zrlaw.com
ZASHIN & RICH CO., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that on February 27, 2017 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

s/ Stephen S. Zashin
Stephen S. Zashin (#0064557) - ssz@zrlaw.com
Patrick J. Hoban (#0079794) - pjh@zrlaw.com
David R. Vance (#0083842) - drv@zrlaw.com
ZASHIN & RICH CO., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113
Telephone: (216) 696-4441
Facsimile: (216) 696-1618

Attorneys for Plaintiff

LexisNexis

Berman v. Arlington Bank

United States District Court for the Northern District of Ohio, Eastern Division

February 22, 2013, Decided; February 22, 2013, Filed

CASE NO. 4:12 CV 2888

Reporter
2013 U.S. Dist. LEXIS 24523 *; 2013 WL 682814

M.A. BERMAN, Plaintiff, v. ARLINGTON BANK, et al., Defendants.

Subsequent History: Motion denied by, Injunction granted at *Berman v. Arlington Bank, 2013 U.S. Dist. LEXIS 143277 (N.D. Ohio, Oct. 2, 2013)*

Prior History: *Arlington Bank v. Bee, Inc., 2010 Ohio 6040, 2010 Ohio App. LEXIS 5074 (Ohio Ct. App., Franklin County, Dec. 9, 2010)*

Counsel: **[*1]** M. A. Berman, Plaintiff, Pro se, Columbus, OH.

For Arlington Bank, Matt Hohl, Jack D'Aurora, John J. MacKinnon, Behal Law Offices LLC, Defendants: John K. D'Aurora, Behal Law Group, Columbus, OH.

For John Sherrod, Defendant: John P. Sherrod, Mills Mills Fiely & Lucas - Columbus, Columbus, OH.

For W. M. Jump, Jump Legal Group, Defendants: John G. Farnan, Weston Hurd - Cleveland, Cleveland, OH; W. Charles Curley, Weston Hurd - Columbus, Columbus, OH.

Judges: HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE.

Opinion by: SARA LIOI

Opinion

MEMORANDUM OF OPINION AND ORDER

Pro se plaintiff Mark A. Berman[1] filed this action under *42 U.S.C. §§ 1983* and *1985*, the Home Ownership Equity Protection Act ("HOEPA") and the Truth in Lending Act ("TILA") *15 U.S.C. § 1640*, the Racketeer Influenced Corrupt Organizations Act ("RICO") *18 U.S.C. § 1961*, and criminal statutes *18 U.S.C. § 1341* (mail fraud), *§ 1343* (wire fraud), and *§ 1344* (bank fraud) against Arlington Bank, Arlington Bank Vice President Matt Hohl, Attorney Jack D'Aurora, Attorney John MacKinnon, the Behal Law Offices, LLC, Attorney John Sherrod, Attorney W.M. Jump, and the Jump Legal Group. In addition, plaintiff asserts numerous state law causes of action. He raises numerous **[*2]** objections to a foreclosure action in the Franklin County Court of Common Pleas. He seeks monetary damages, reversal of the foreclosure judgment, an order setting aside the sheriff's sale and voiding the deed of transfer, and a judgment quieting title to the property in his favor.

Plaintiff also filed a motion to proceed *in forma pauperis*. (ECF No. 2). That motion is granted.

On January 7, 2013, defendants Arlington Bank, Behal Law Offices LLC, Jack D'Aurora, Matt Hohl, and John J. MacKinnon filed a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(3)*, combined with a motion for sanctions. (ECF No. 4.) Defendants contend the United States District Court for the Northern District of Ohio is not the proper venue **[*3]** to hear this case.

---

[1] Mr. Berman captions this action as "State *ex rel* M.A. Berman." The term *ex rel* is derived from the Latin *ex relatione* which means "by or on the relation of." A suit *ex rel*. is typically brought by the government upon the application of a private party (called a *relator*) who is interested in the matter. BLACK'S LAW DICTIONARY (9th ed. 2009). Mr. Berman, not the State of Ohio, is bringing this action based on his own interests. The use of the term "State *ex rel*" is inappropriate.

EXHIBIT 1

Thereafter, plaintiff filed motions seeking default judgment against all of the defendants. He states the defendants were served with notice and waiver forms and copies of the complaint, and failed to filed responsive pleadings.

Defendants W.M. Jump, and the Jump Legal Group filed a memorandum in opposition to the motion for default judgment on February 14, 2013. (ECF No. 26). John Sherrod filed a nearly identical memorandum in opposition on February 15, 2013. (ECF No. 28). They contend they have not yet been properly served with the complaint. They also claim venue is improper in the Northern District of Ohio.

For the reasons stated below, the motion to dismiss is granted, the motion for sanctions is denied without prejudice, the motions for default judgment are all denied, and this action is dismissed.

Background

Plaintiff alleges he purchased a condominium located at 2815 Avati Dr., Columbus, Ohio in September 2001. He obtained financing for the purchase through an adjustable rate mortgage in the amount of $44,500.00 through Arlington Bank in Columbus, Ohio. He claims he could not attend the closing and therefore was required by Arlington Bank to create a corporate **[*4]** "straw man" titleholder for the purpose of signing the mortgage. He contends he created BEE, Inc., as the non-operating shell corporation to purchase the property. The mortgage and the note were signed twice by Larry Berman using a Power of Attorney for Mark Berman. The first signature indicates Larry Berman signed for Mark Berman individually and the second signature indicates he signed for Mark Berman as "president" of BEE, Inc. (ECF No. 4-3 at 5.) Plaintiff indicates Arlington Bank was aware the condominium was to be used as Plaintiff's personal residence. Nevertheless, Larry Berman also executed a "Non-Owner Occupancy Rider" for Mark Berman as an individual and as president of BEE, Inc., stating: "In modification of and notwithstanding the provision of Section 6 of the Security Instrument, Borrower represents that (s)he does not intend to occupy the property described in the Security Instrument as a principal residence." (ECF No. 4-3 at 13.)

Plaintiff executed a Home Equity Line of Credit and Open Ended Mortgage with Arlington Bank in December 2001 in the amount of $15,000.00. This note, signed by Mark Berman on behalf of himself individually and as president of BEE, Inc., contains **[*5]** a warning that "[b]y signing this paper you give up your right to notice and court trial." (ECF No. 4-3 at 14.) It further advises Mr. Berman that "if you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement or any other cause." (ECF No. 4-3 at 14.)

It appears yet another adjustable rate mortgage was taken out by Mark Berman on behalf of himself and BEE, Inc. through Arlington Bank in March 2005 in the amount of $58,703.00. The note, signed by Mr. Berman as president of BEE, Inc., specifically states in a section titled "Statement Concerning Nature of Loan Transaction" that "[e]ach of the undersigned hereby warrants and represents to the holder hereof that the proceeds of this loan will be used by the undersigned for business or commercial purposes and will not be used for personal, family, education or household purposes." (ECF No. 4-3 at 26.) This note replaced the previous note and the Home Equity Line of Credit.

Plaintiff alleges he entered **[*6]** into negotiations with Arlington Bank to refinance the mortgage in January 2009. He claims that, as a condition of the refinancing, the bank demanded that the property be transferred out of the name of BEE, Inc. and solely into his name as an individual. He claims he complied with the request and transferred the property to Mark Berman, Trustee. He does not indicate the name of the trust or the beneficiary of the trust for whom the property was held. He states that "Matt Hohl, Arlington's senior officer, was notified of the transfer and the Bank had no objection." Plaintiff claims that when the proposed refinancing documents were sent to him, he noted that the payments and interest rates were higher than those previously represented to him. He contends the Bank offered to extend the term of the loan to lower the monthly payments, but he refused. It does not appear he signed these loan documents.

Arlington Bank, represented by Columbus Ohio attorney Jack D'Aurora of the Columbus, Ohio law firm, the Behal Law Group, LLC, filed a foreclosure action in the Franklin County Court of Common Pleas on May 22, 2009 against BEE, Inc., and Mark Berman. The action, which was assigned to Franklin **[*7]** County Common Pleas Court Judge Beatty, was divided into two causes of action, one for breach of contract and the other for foreclosure. The Bank alleged BEE, Inc. and Mr. Berman failed to make payments on the note beginning

in January 2009. The foreclosure complaint further indicated that the note executed by Mr. Berman was a cognovit promissory note and, pursuant to *Ohio Rev. Code § 2323.13*, any Ohio attorney could enter an appearance on behalf of the Bank and confess judgment against Berman and BEE, Inc. when default occurred. Columbus, Ohio Attorney Jack MacKinnon, also with the Behal Law Group, LLC, apparently acting as the confessor of judgment, filed an answer to the complaint on behalf of BEE, Inc. and Mark Berman admitting all of the allegations. That answer was filed along with the complaint on May 22, 2009. On June 24, 2009, plaintiff responded to the complaint with a *pro se* motion to dismiss pursuant to Ohio R. Civ. P. 12(b)(6), claiming Arlington Bank had not properly established that it was a real party in interest.

The common pleas court transferred the action to its commercial docket on July 10, 2009. This action not only changed the classification of the case, but also **[*8]** moved the case from Judge Beatty's docket, to the docket of Judge Frye. Berman objected to the transfer and asked Judge Beatty to reconsider her decision. On October 16, 2009, Judge Frye addressed both Berman's motion to dismiss and his motion to reverse the transfer to the commercial docket. Based on the "Non-Owner Occupancy Rider" submitted with the original mortgage, and the statement of business purpose attested to by Berman as president of BEE, Inc. in the March 25, 2005 mortgage, the court determined that the case was not an individual real estate foreclosure as Berman contended and was properly on the commercial docket. Judge Frye denied the motion to reverse the transfer. He also denied the motion to dismiss, indicating that the mortgages all named Arlington Bank as the holder of the loan, thereby making it clearly a party in interest. Finally, the court found the cognovit judgment was proper, noting that the cognovit warning language was clearly underlined, bolded, capitalized in a larger font and boxed just above the signature blocks. Judge Frye granted judgment in favor of Arlington Bank on the first count of the complaint for breach of contract.

Arlington Bank then filed **[*9]** a motion for default judgment against BEE, Inc. and Berman on the second cause of action for foreclosure. Neither BEE, Inc. nor Berman responded to the motion and, on December 18, 2009, the court entered a default judgment against both of them.

Plaintiff appealed these judgments to the Ohio Tenth District Court of Appeals on January 15, 2010. He also filed a mandamus action against Judge Frye and Judge Beatty on March 8, 2010. The following day, he filed a motion to stay the execution of the judgment in the trial court and asked the court to vacate the default judgment. That motion was denied. He filed a motion in the Ohio court of appeals to stay the execution of the judgment. That motion was granted on the condition that plaintiff post a supersedeas bond. Plaintiff did not post a bond, but instead filed a document he created titled "Bonded Promissory Note" which claimed to be a "set off treasury" via "a pass-through account of Sylvester G. Foster." It purported to be backed by the United States Treasury, and relied on the Uniform Commercial Code, the Hague Convention and "Laws of Necessity," as support for its validity. The court of appeals did not deem the document to be an adequate **[*10]** supersedeas bond, as required to maintain the stay, and the sheriff's sale of the property was conducted on March 12, 2010. Arlington Bank was the successful bidder.

On the day of the sheriff's sale, plaintiff filed a chapter 7 bankruptcy petition on behalf of BEE, Inc. in the United States Bankruptcy Court for the Southern District of Ohio. He obtained an order from the common pleas court to stay the auction, but the order was not issued until after the property was sold. On March 12, 2010, he filed a motion in the court of appeals seeking to hold the bank in contempt and requested that sanctions be issued against the bank. The bankruptcy case was dismissed on April 2, 2010 for failure to correct the deficiencies in his petition. With the automatic stay of the bankruptcy lifted, the appeal of the foreclosure and the mandamus actions were returned to the active docket of the Ohio Tenth District Court of Appeals.

Five days later, plaintiff attempted to remove the appeal to the United States District Court for the Southern District of Ohio. The defendants filed a motion for remand. After plaintiff filed several more motions, including a motion for judgment on the pleadings, the case was **[*11]** remanded to the Ohio appellate court on July 27, 2010. Plaintiff filed a motion for reconsideration which was denied on August 11, 2010.

The appeal was reactivated upon remand. Plaintiff filed an objection to the reactivation, claimed the court of appeals had lost jurisdiction and moved to transfer the case. His objection was overruled on September 14, 2010. The court of appeals affirmed the foreclosure judgment on December 9, 2010. The common pleas court thereafter confirmed the sale of the property to Arlington Bank on December 20, 2010. The mandamus action was dismissed by the court of appeals on

February 2, 2011.

On March 4, 2011, Arlington Bank filed a writ of possession to evict plaintiff from the property. In response, plaintiff filed a personal chapter 7 bankruptcy. *See In re Berman*, No. 2:11 bk 54694 (S.D. Ohio, filed April 29, 2011). In that petition, Berman listed only one asset, the condo located at 2815 Avati Drive, Columbus, Ohio. The petition was dismissed on May 18, 2011 because Berman failed to file required information. Arlington Bank filed a second writ of possession on May 25, 2011.

Plaintiff retained the services of the Jump Legal Group and, on June 21, 2011, filed **[*12]** an action to quiet title in the Franklin County Court of Common Pleas claiming that the mortgage through Arlington Bank was invalid and unenforceable. He also filed an emergency motion for stay of the eviction, and a motion to vacate the foreclosure judgment on June 22, 2011. The motion for stay of the eviction was denied on June 22, 2011. The motion to vacate the foreclosure was denied on June 29, 2011.

Plaintiff filed a second personal chapter 7 bankruptcy on June 23, 2011, the day after the motion to stay the eviction was denied. *See In re Berman*, No. 2:11 bk 54694 (S.D. Ohio, filed April 29, 2011). He also filed an adversarial proceeding in the bankruptcy court against Arlington Bank, the Valley Green Association, the Ohio Department of Taxation, the Franklin County Treasurer, Jack D'Aurora and John MacKinnon. *See Berman v. Arlington Bank*, No. 2:11-ap-2314 (S.D. Ohio, filed July 15, 2011). The bankruptcy was dismissed on July 18, 2011 because plaintiff did not file required information. The adversarial proceeding was dismissed for lack of jurisdiction on July 19, 2011. On July 22, 2011, the trial court lifted the bankruptcy stay in the eviction action and plaintiff was vacated from **[*13]** the property.

The action to quiet title was still pending in the Franklin County Court of Common Pleas when the bankruptcy stay was lifted. Plaintiff refused to appear for depositions on several occasions. His counsel withdrew from the case on August 12, 2011. The action was dismissed with prejudice on September 15, 2011.

Plaintiff has now filed the within action to challenge the foreclosure. His complaint contains twenty counts for relief. First, plaintiff seeks rescission of the loan, damages and attorney fees under the Home Ownership Equity Protection Act (HOEPA) and the Truth In Lending Act (TILA) *15 U.S.C. § 1640(a)(2)(A)* and *(B)*. He also asserts a claim under the Ohio Consumer Sales Practices Act, *Ohio Rev. Code § 1345.01*. In his second count for relief, plaintiff challenges the cognovit confession of judgment as invalid under Ohio law. His third count for relief contains a claim for the state tort of negligent misrepresentation. His fourth count contains a claim for breach of fiduciary duty against the foreclosing defendants and the attorneys with the Jump Legal Group. His fifth count contains an attorney malpractice claim against John MacKinnon and Jack D'Aurora. His sixth count **[*14]** contains a claim for breach of contract against the Jump Legal Group, John Sherrod and Mark Jump. Plaintiff's seventh count cites foreclosure fraud in violation of *Ohio Rev. Code § 2323.13*. His eighth and ninth counts contain claims for intentional and negligent infliction of emotional distress. Plaintiff's tenth and eleventh counts assert claims of criminal activity for mail fraud, wire fraud, and bank fraud in violation of *18 U.S.C. §§ 1341*, *1343*, and *1344*. Counts twelve, thirteen and fourteen do not set forth legal claims but rather ask this Court to set aside the sheriff's sale, cancel the deed issued in the sheriff's sale and cancel the transfer of the sheriff's deed in the foreclosure action. Count fifteen of the complaint contains causes of action under *42 U.S.C. §§ 1983* and *1985*. Count sixteen asserts a claim under the Racketeer Influenced Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961*. Count seventeen contains a claim for breach of the implied covenant of good faith and fair dealing in connection with the foreclosure proceedings. Count eighteen asserts a claim for unjust enrichment. Count nineteen asks this Court to quiet title to the real property located at 2815 Avati **[*15]** Drive, Columbus, Ohio. Count twenty also contains no legal claim but seeks relief in the form of a declaratory judgment vesting title to the Avati Drive property in plaintiff's name.

Motions for Default Judgment

Plaintiff filed motions for default judgment against the defendants. (ECF Nos. 6, 8, 10, 12, 14, 16, 18 and 20.) *Fed. R. Civ. P. 12(a)(1)* provides that, unless another time is specified by the rule or by federal statute, the time for filing an answer or responsive pleading is 21 days after service of the summons and complaint. Before serving an answer, a party may file a motion to dismiss asserting any of the grounds listed in *Rule 12*. The filing of such a motion alters the time period for filing an answer. *Fed. R. Civ. P. 12(a)(4)*.

Defendants Jack D'Aurora, Arlington Bank, Matt Hohl, John MacKinnon, and the Behal Law Offices, LLC filed a motion to dismiss under *Rule 12(b)(3)*. *Rule 12(a)(4)* provides that the time to file an answer to a complaint is

postponed, generally, until fourteen days after the court decides a motion to dismiss filed under Rule 12. Because the Court has not yet addressed the motion to dismiss, there is no basis to conclude these defendants are in default **[*16]** of an answer.

W.M. Jump and the Jump Legal Group filed an opposition to the motion for default judgment on February 14, 2013. (ECF No. 26.) John Sherrod filed a substantially similar opposition to the motion for default judgment on February 15, 2013. (ECF No. 28.) These three defendants contend plaintiff has not served them. They indicate plaintiff delivered a notice and request for waiver of service to them but did not include a proper summons. They do not indicate whether they were provided with a copy of the complaint. They claim that because plaintiff "has been granted leave to proceed *in forma pauperis*, waiver of service under FRCP 4(d) is not an option and service must be made by the U.S. Marshal." (ECF No. 26 at 2.) They further claim that, because the Court has not recorded on the docket that it completed a judicial review of the complaint and approved it, the action cannot proceed and the motion for default is premature. (ECF No. 26 at 1, No. 28 at 1.)

The defendants misread LR 4.1(a) as prohibiting an *in forma pauperis* plaintiff from serving the defendants by any means other than through the United States Marshal Service. *See* Fed. R. Civ. P. 4; 28 U.S.C. § 1915(c). While the **[*17]** Court is required to instruct the United States Marshal to conduct service for the plaintiff if he is permitted to waive the filing fee, this provision is in place to assist the plaintiff, not to limit his options for service or to penalize him if he perfects service on his own. *See* Byrd v. Stone, 94 F.3d 217, 219 (6th Cir. 1996) (stating that the Marshal is directed to serve the complaint because a plaintiff proceeding *in forma pauperis* may not have the ability to perfect service). In other words, a plaintiff in an *in forma pauperis* action is not prohibited from accomplishing service of the complaint and summons by any other means acceptable under Rule 4. Conversely, there is no suggestion in LR 4.1, Fed. R. Civ. P. 4 or 28 U.S.C. § 1915(c), that a defendant who receives service by any other means specified in Rule 4 may claim insufficient service of process simply because he was not served by the United States Marshal.

These defendants also assert that the motion for default judgment is premature because the Court has not yet docketed its review of the complaint and approval for the action to proceed. (ECF No. 26 at 1, No. 28 at 1.) While the Court conducts a screening under LR 4.1, **[*18]** neither this local rule nor 28 U.S.C. § 1915(e) suggest that the review must be formally documented or that the case is stayed until the Court concludes its review and permits the action to go forward. Neither the local rule nor the statute requires the Court to publish the results of its review of the complaint. If defendants have been properly served with the complaint in accordance with Fed. R. Civ. P. 4, the time for them to file a responsive pleading is not tolled by the Court's internal review process.

Plaintiff, however, has not filed a proof of service suggesting any of the defendants were served. The Court has just granted plaintiff's request to proceed *in forma pauperis* and therefore has not yet directed the United States Marshal to serve the defendants. He has not provided sufficient information for the Court to determine whether he adequately served the defendants on his own. While plaintiff states in his motions for default judgment that he served the defendants, he does not indicate the date on which they were served or the method by which they were served. It is therefore impossible for the Court to determine whether the defendants are in default. Consequently, plaintiff's **[*19]** motions for default judgment are **denied**. (ECF Nos. 6, 8, 10, 12, 14, 16, 18 and 20.)

Motion to Dismiss 12(b)(3) - Venue

Jack D'Aurora, Arlington Bank, Matt Hohl, John MacKinnon, and the Behal Law Offices, LLC move for dismissal of the action on the ground that venue is improper in the Northern District of Ohio. A party may move to dismiss an action under Fed. R. Civ. P. 12(b)(3) when a case has been filed in an improper venue. If a defendant challenges venue pursuant to Rule 12(b)(3), the plaintiff bears the burden of proving that his chosen venue is proper. Centerville ALF, Inc. v. Balanced Care Corp., 197 F.Supp.2d 1039, 1046 (S.D. Ohio 2002). In reviewing the motion, the Court may examine facts outside the complaint, but must draw all reasonable inferences and resolve factual conflicts in favor of the plaintiff. Gone to the Beach, LLC v. Choicepoint Servs., Inc., 434 F.Supp.2d 534, 536-37 (W.D. Tenn. 2006) (quoting Audi AG & Volkswagen of Am., Inc. v. Izumi, 204 F.Supp.2d 1014, 1017 (E.D. Mich. 2002)). If the Court finds that venue is improper, the case should be dismissed, unless the Court determines that it would be in the interest of justice to transfer the case to a district or **[*20]** division in which the action could have been brought. 28 U.S.C. § 1406(a).

The requirements for venue are set forth by statute.

Kerobo v. Sw. Clean Fuels Corp., 285 F. 3d 531, 538 (6th Cir. 2002). In a civil action where jurisdiction is not founded solely on diversity of citizenship, venue is governed by 28 U.S.C. § 1391(b), which allows the action to be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought. 28 U.S.C. § 1391(b).

In this case, all three of the criteria establish venue in the Southern District of Ohio. Plaintiff lists Columbus, Ohio addresses for all of the defendants. The real property at issue is located in Columbus, Ohio. The loan transactions were notarized in Franklin County, Ohio. The foreclosure action was filed in the Franklin County Court of Common Pleas. In fact, plaintiff also resides in the Southern District of Ohio. The case has no connection to this district **[*21]** and appears to have been brought here in the hope of simply achieving a new result in a forum unfamiliar with his case. Venue in the Northern District of Ohio is improper. Therefore, defendants' motion to dismiss under 12(b)(3) is **granted**. (ECF No. 4.)

Failure to State a Claim — *28 U.S.C. § 1915(e)*

Because the Court finds that the case fails to state a claim upon which relief may be granted and it therefore would not be in the interest of justice to transfer this case to the Southern District of Ohio, this action is dismissed. Although *pro se* pleadings are liberally construed, Boag v. MacDougall, 454 U.S. 364, 365, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982) (per curiam), the district court is required to dismiss an *in forma pauperis* action under 28 U.S.C. § 1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact. McGore v. Wrigglesworth, 114 F.3d 601, 608-09 (6th Cir. 1997). A claim lacks an arguable basis in law or fact when it is premised on an indisputably meritless legal theory or when the factual contentions are clearly baseless. Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989). A cause of action fails to state a claim upon which relief may be granted when **[*22]** it lacks "plausibility in the complaint." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Ashcroft v. Iqbal, 556 U.S. 662, 677-678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The factual allegations in the pleading must be sufficient to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true. Twombly, 550 U.S. at 555. Plaintiff is not required to include detailed factual allegations, but must provide more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678. A pleading that offers legal conclusions or a simple recitation of the elements of a cause of action will not meet this pleading standard. Id. In reviewing a complaint, the Court must construe the pleading in the light most favorable to the Plaintiff

In this case, dismissal of the complaint in its entirety is appropriate. Of the twenty counts raised in this action, only five assert a federal cause of action. Two of those counts (ten and eleven) are based on violations of federal criminal law. Criminal statutes do not provide a private right of **[*23]** action to a civil plaintiff. *See* Booth v. Henson, 290 Fed. Appx. 919, 2008 WL 4093498, at *1 (6th Cir. 2008); United States v. Oguaju, 76 Fed. Appx. 579, 2003 WL 21580657, *2 (6th Cir. 2003).

The remaining three counts that cite federal causes of action seek to relitigate claims and issues which were already raised or which should have been raised in the state court foreclosure action. Plaintiff asks this Court to reverse the foreclosure judgment, order the sheriff's sale of the property vacated, void the deed of transfer, and grant him a judgment quieting title to the property in his favor. This federal court must give a state court judgment the same preclusive effect it would have in the courts of the rendering state. 28 U.S.C. § 1738; Dubuc v. Green Oak Township, 312 F.3d 736, 744 (6th Cir. 2002). In other words, if plaintiff is barred from bringing another action in state court to litigate these matters, he cannot file an action in federal court to by-pass that restriction. This Court must give full faith and credit to the state court judgment.

When a federal court is faced with questions which may be precluded by a prior state court judgment, the federal court must apply the **[*24]** law of the state in which the prior judgment was rendered in determining whether the prior judgment should be given preclusive effect in a federal action. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). An Ohio state court already issued an order granting the foreclosure, confirming the sheriff's sale, and granting a writ of possession. The Ohio Tenth District Court of Appeals considered these matters and affirmed the judgments of the Franklin County Court of Common Pleas. This Court must look to Ohio law

regarding *res judicata* in considering whether any of the claims raised by plaintiff in this federal complaint are barred by these state court judgments.

Under Ohio law, the doctrine of *res judicata* dictates that "a final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Johnson's Island, Inc. v. Bd. of Twp. Trustees, 69 Ohio St.2d 241, 243, 431 N.E.2d 672 (1982)*. Application of the doctrine of *res* **[*25]** *judicata* does not depend on whether the original claim explored all possible theories of relief. *Brown v. Dayton, 89 Ohio St.3d 245, 248, 2000 Ohio 148, 730 N.E.2d 958 (2000)*. Rather, "a valid, final judgment upon the merits of the case bars any subsequent action 'based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.'" *Grava v. Parkman Twp., 73 Ohio St.3d 379, 382, 1995 Ohio 331, 653 N.E.2d 226 (1995)*.

The doctrine of *res judicata* in Ohio encompasses the two related concepts of claim preclusion and issue preclusion. *State ex rel. Davis v. Pub. Emp. Ret. Bd., 120 Ohio St.3d 386, 392, 2008 Ohio 6254, 899 N.E.2d 975 (2008)*. Under the doctrine of claim preclusion, "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava, 73 Ohio St.3d at 382*. The doctrine of claim preclusion encompasses "all claims which were or might have been litigated in a first lawsuit." *Id*. Claim preclusion has four elements: (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second **[*26]** action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. *In re Fordu, 201 F.3d 693, 703-04 (6th Cir. 1999)* (construing Ohio law).

Similarly, issue preclusion, or collateral estoppel, "precludes the relitigation of an issue that has been actually and necessarily litigated and determined in a prior action." *MetroHealth Medical Ctr. v. Hoffmann-Laroche, Inc.., 80 Ohio St. 3d 212, 217, 1997 Ohio 345, 685 N.E.2d 529 (1997)*. Issue preclusion applies when a fact or issue "(1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction; and (3) when the party against whom [issue preclusion] is asserted was a party in privity with a party to the prior action." *Thompson v. Wing, 70 Ohio St.3d 176, 183, 1994 Ohio 358, 637 N.E.2d 917 (1994)*.

The Court notes that the doctrine of *res judicata* is an affirmative defense that generally must be raised by the defendants in a responsive pleading. *Fed. R. Civ. P. 8(c)(1)*; Ohio R. Civ. P. 8 (C); *see Haskell v. Wash. Township, 864 F.2d 1266, 1273 (6th Cir.1988)*. The United States Supreme Court as well as the Sixth **[*27]** Circuit of Appeals have indicated that a court may take the initiative to assert the *res judicata* defense *sua sponte* in "special circumstances." *Arizona v. California, 530 U.S. 392, 412, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)*; *Hutcherson v. Lauderdale County, Tennessee, 326 F.3d 747, 757 (6th Cir. 2003)*; *Holloway Constr. Co. v. United States Dep't of Labor, 891 F.2d 1211, 1212 (6th Cir. 1989)* ("a district court may invoke the doctrine of *res judicata* in the interests of, inter alia, the promotion of judicial economy.")

This case fits precisely within those circumstances. Plaintiff has already thoroughly and repetitively litigated this matter in state and federal court. In addition to the many motions he filed in the course of the foreclosure action, he also filed a motion to stay the execution of the judgment, and a motion to vacate the judgment. He filed a direct appeal, and a mandamus action against the state court judges who presided over the foreclosure. When the appeal was not proceeding as he hoped, he attempted to remove the pending appeal to the United States District Court for the Southern District of Ohio. The defendants filed a motion for remand which was met by additional motions filed by the plaintiff, **[*28]** including a motion for judgment on the pleadings. He filed a motion for reconsideration of the remand, objected to the reactivation of the appeal in state court after remand, argued that the court of appeals had lost jurisdiction, and moved to transfer the case. Thereafter, plaintiff filed three bankruptcy actions for the sole purpose of obtaining an automatic stay of the collection proceedings, and an adversarial action in the bankruptcy court. Arlington Bank filed two writs of possession, one on March 4, 2011 and another on May 25, 2011, to evict plaintiff from the property after the sale was confirmed. In response, plaintiff filed an action to quiet title in the Franklin County Court of Common Pleas claiming that the mortgage through Arlington Bank was invalid and unenforceable. He also filed an emergency motion for stay of the eviction, and a motion to vacate the foreclosure judgment on June 22, 2011.

Plaintiff has now filed the within action in this Court, where venue is clearly improper, seeking a new forum to continue litigation. Judicial economy requires dismissal of this action.

Applying the Ohio law on *res judicata*, the Court concludes plaintiff is barred from relitigating **[*29]** the federal claims asserted in this action. For *res judicata* to apply, the parties to this action must be the same as the parties in the state court actions or in privity to the parties in that action. Plaintiff and Arlington Bank were parties to the foreclosure action. Matt Hohl is the Vice President of Arlington Bank in charge of collections. Jack D'Aurora, John MacKinnon and the Behal Law Group, LLC represented Arlington Bank. John Sherrod, W.M. Jump and the Jump Legal Group represented plaintiff during post-judgment litigation in the foreclosure action. They are the same or in privity to the parties in the state court actions.

Of the five counts in the complaint that assert federal causes of action, only three of them assert claims under federal civil statutes. In count one, plaintiff seeks rescission of the loan pursuant to HOEPA and TILA. While this is the first time plaintiff has cited to HOEPA and TILA as support for relief, he claimed he was exercising his right to rescission in his state court quiet title action. (ECF No. 4-55.) The common pleas court dismissed the quiet title action on the merits with prejudice in favor of Arlington Bank as a sanction against plaintiff for **[*30]** refusing to appear for his deposition. (ECF No 4-62 at 3.) That judgment on the merits with prejudice operates as a bar to relitigation of that claim in federal court.

Moreover, plaintiff does not provide any explanation to support his claims under HOEPA and TILA. These statutes require creditors to provide borrowers with clear and accurate disclosures of terms such as finance charges, annual percentage rates of interest, and the borrower's rights, including notice of the borrower's right of rescission. *Fiorenza v. Fremont Inv. & Loan, No. 08-CV-858, 2008 U.S. Dist. LEXIS 47831, 2008 WL 2517139, at *2 (S.D.N.Y. June 20, 2008)*. Plaintiff states in a conclusory manner that these statutes apply, but he does not allege any facts to suggest how they may be applicable or which loan terms, if any, were not disclosed to him. He fails to allege facts to indicate how any of the defendants violated these statutes. Even if this claim were not barred by *res judicata*, it would be dismissed for failure to state a claim.

In count fifteen, plaintiff asserts that the defendants violated his *Fourth Amendment* right by pursuing his eviction from the premises, his *Fifth* and *Fourteenth Amendment* rights to due process in the foreclosure **[*31]** proceedings, his *Seventh Amendment* rights to a jury trial and his *Fourteenth Amendment* right to equal protection during the foreclosure proceeding. Plaintiff attempted to assert claims under *42 U.S.C. § 1983* in his removal of his appeal to the United States District Court for the Southern District of Ohio. The appeal was remanded to the state court for lack of subject matter jurisdiction. In addition, plaintiff could have and should have asserted his claims of denial of due process in his appeal from the state court foreclosure judgment. These claims are also barred by *res judicata*.

Moreover, plaintiff's *§ 1983* claims are also subject to dismissal because they cannot be asserted against defendants who are not Ohio government officials or employees. *See Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)*. To establish a *prima facie* case under *42 U.S.C. § 1983*, plaintiff must assert that a person acting under color of state law deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Id.* Generally, to be considered to have acted "under color of state law," the person must be a state or local government official or employee. A private party may **[*32]** be found to have acted under color of state law to establish the first element of this cause of action only when the party "acted together with or . . . obtained significant aid from state officials" and did so to such a degree that its actions may properly be characterized as "state action." *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*. An individual may also be considered a state actor if he or she exercises powers traditionally reserved to a state. *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)*. Plaintiff has not included any allegations in his complaint which suggest any of the defendants can be considered a "state actor." Merely being a participant in litigation does not make a private party a co-conspirator or joint actor with the state. *Dennis v. Sparks, 449 U.S. 24, 28, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980)*.

Also in count fifteen, plaintiff asserts, again without explanation, that the defendants conspired in the course of the foreclosure action to defraud him for the purpose of accruing an economic gain for themselves in violation of *42 U.S.C. § 1985*. Plaintiff has not asserted a claim under this statute in prior state court actions; however, he has included vague references to fraud **[*33]** in the foreclosure in numerous state court filing. This type of

general allegation has been raised in state court proceedings but was never explained or expounded upon. It is therefore impossible to determine whether this claim was actually litigated in state court. A claim of conspiracy to commit fraud in the mortgage transaction could and should have been raised in the course of the foreclosure, the appeal, or the quiet title actions.

Moreover, in this federal action, plaintiff relies on conclusory statements of law devoid of facts to assert this claim. Conspiracy claims must be premised upon more than mere conclusions and opinions. *Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987)*. A plaintiff must make sufficient factual allegations to link two alleged conspirators in the conspiracy and to establish the requisite "meeting of the minds" essential to the existence of the conspiracy. *McDowell v. Jones, 990 F.2d 433, 434 (8th Cir. 1993)* (holding that plaintiff failed to state a claim for conspiracy pursuant to *§ 1985* for failure to allege a meeting of the minds). This allegation, if there are facts to support it, could have and should have been raised in the state court **[*34]** matter.

Furthermore, *42 U.S.C. § 1985* provides a cause of action for an individual harmed by a conspiracy to deprive him or class of persons of equal protection of the laws. *Vakilian v. Shaw, 335 F.3d 509, 518 (6th Cir.2003)* (citing *United Bhd. of Carpenters & Joiners of Am. v. Scott, 463 U.S. 825, 828-29, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983))*. For plaintiff to state a claim under *§ 1985*, he must allege facts suggesting the defendants' conspiracy was the result of class-based discrimination (such as race, gender, or national origin) and was designed to deprive him of equal protection. *Id*. (citing *Newell v. Brown, 981 F.2d 880, 886 (6th Cir.1992))*. There is no indication in the pleading of any type of class-based discrimination in the foreclosure proceeding.

The final federal claim plaintiff asserts is his RICO claim found in count sixteen. Plaintiff contends that the defendants engaged in a conspiracy from September 2001 (when he used BEE, Inc. as a "straw man" to purchase the condominium) to the present date, to participate in a pattern of racketeering. He claims they intentionally failed to disclose information, made misrepresentations, fabricated loan documents and executed foreclosure documents which constituted **[*35]** an "enterprise" as defined by the statute. Plaintiff does not explain what information he believes was not disclosed to him, what terms he feels were misrepresented, or even which documents he believes were fabricated. In the body of the complaint, he challenges the transfer of the case to the commercial docket, claims Arlington Bank lacked standing because it failed to provide documentary evidence that it was the real party in interest at the time of the filing of the foreclosure, challenges the confession of judgment on the cognovit note which he claimed to be invalid under Ohio law, claims Jack D'Aurora "fabricated foreclosure documents," and claims his loan was not actually in default. The trial court already determined that the transfer of the case to the commercial docket was proper, that Arlington Bank was the real party in interest in the foreclosure based on the loan documents, that the cognovit provision was highly visible and therefore valid, and that plaintiff was in default of the mortgage. Plaintiff cannot assert these challenges for a second time by characterizing them as a RICO claim.

In addition, plaintiff asserted a RICO claim under *18 U.S.C. § 1964* in his quiet title **[*36]** action. That action was dismissed with prejudice, thereby precluding plaintiff from asserting that claim in this federal action.

Furthermore, plaintiff fails to state a claim under RICO. Pursuant to *18 U.S.C. § 1964(c)*, RICO provides a private right of action for "[a]ny person injured in his business or property by reason of a violation of [*18 U.S.C. § 1962*]." In turn, *Section 1962* states in relevant part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

A "pattern of racketeering activity" requires at least two acts of "racketeering activity" which are set forth in *Section 1961(1)*.[2] *18 U.S.C. § 1961(5)*. An "unlawful

---

[2] *18 U.S.C. § 1961(1)* defines a "racketeering activity" as: (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title ***18, United States Code: §201*** (bribery),***§24*** (sports bribery), **[*38]** ***§§471***, ***472***, and ***473*** (counterfeiting), ***§659*** (theft from interstate shipment),***§664*** (embezzlement from pension and welfare funds), *§891-894*

debt" is a debt which was incurred in an illegal gambling activity through an illegal gambling business, or a debt unenforceable because of usury laws and which was obtained **[*37]** through a business enterprise that loans money at a usury interest rate that is at least twice the enforceable rate. *18 U.S.C. § 1961(6)*; *Saglioccolo v. Eagle Ins. Co., 112 F.3d 226, 229 (6th Cir. 1997)*. To prove a defendant violated *§ 1962(c)*, it is necessary for the plaintiff to prove either that the defendant committed two predicate offenses to establish a pattern of racketeering activity or that the defendant was engaged in the business of collecting illegal gambling debts or debts with interest rates twice the State or Federal usury rates. To violate *Section 1962(d)*, a defendant must conspire with another person who commits two acts of racketeering activity. *United States v. Joseph, 781 F.2d 549, 554 (6th Cir. 1986)*.

Plaintiff provides no allegations suggesting the defendants committed two or more predicate offenses, engaged in collecting illegal gambling debts, or attempted to collect a debt with an interest rate twice the usury rates. In counts ten and eleven of his complaint, he attempts to assert claims for bank fraud and mail fraud by reciting the wording of the statutes; however, he includes **[*41]** no factual allegations to indicate how these defendants committed the acts in question. Legal conclusions unsupported by facts are not sufficient to state a claim for relief. *Iqbal, 556 U.S. at 678*.

Plaintiff's remaining claims all arise, if at all, under state law. Subject matter jurisdiction for these state law claims cannot be based on diversity of citizenship under *28 U.S.C. § 1332(a)(1)*, which vests the federal district courts with jurisdiction in cases of sufficient value between citizens of different states. Plaintiff and all of the defendants are citizens of the state of Ohio. The Court can exercise supplemental jurisdiction over the state law claims if the Court is also entertaining federal law claims that derive from the same nucleus of operative facts and when considerations of judicial economy dictate having a single trial. *United Mine Workers of America v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. The Court, however, has discretion in hearing state law matters and, in cases where the federal law claims are dismissed before trial, the state law claims should also be dismissed. *Id. at 726*. The Court therefore will not examine these claims to determine if they are barred by the doctrine **[*42]** of *res judicata*, because it declines jurisdiction to consider them in light of its dismissal of the federal law claims.

Motion for Sanctions

Finally, Arlington Bank, the Behal Law Offices, Jack D'Aurora, Matt Hohl, and John MacKinnon filed a Motion

---

(extortionate credit transactions), *§1028* (fraud and in connection with identification documents), *§1029* (fraud in connection with access devices), *§1084* (transmission of gambling information), ***§1341*** (mail fraud), *§1343* (wire fraud), *§1344* (financial institution fraud), *§1425* (unlawful procurement of citizenship or nationalization), *§1426* (reproduction of naturalization or citizenship papers), *§1427* (sale of naturalization or citizenship papers),*§1461-1465* (obscene matter), *§1503* (obstruction of justice), *§1510* (obstruction of criminal investigations), *§1511* (obstruction of State or local law enforcement), *§1512* (tampering with a witness, victim, or an informant), *§1513* (retaliating against a witness, victim, or an informant), *§1542* (false statement in application and use of passport), *§1543* (forgery or false use of passport),*§1544* (misuse of passport), *§1546* (fraud and misuse of visas,), *§§1581-1591* (slavery, and trafficking in persons), *§1951* (interference with commerce, robbery, or extortion), *§1952* (racketeering), *§1953* (interstate transportation **[*39]** of wagering paraphernalia), *§1954* (unlawful welfare fund payments), *§1955* (illegal gambling businesses), *§1956* (money laundering), *§1957* (engaging in monetary transactions in property derived from specified unlawful activity), *§1958* (use of interstate commerce in the commission of murder-for-hire), *§§2251*, *2251A*, *2252*, and *2260* (sexual exploitation of children), *§§ 2312* and *2313* (interstate transportation of stolen motor vehicles), *§§2314* and *2315* interstate transportation of stolen property), *§2318* (trafficking in counterfeit labels for phonorecords, computer programs and motion pictures), *§2319* (criminal infringement of a copyright), *§2319A* (unauthorized trafficking in sound recordings and music videos), *§2320* (trafficking in goods or services bearing counterfeit marks), *§2321* (trafficking in certain motor vehicles or motor vehicle parts), *§§2341-2346* (trafficking in contraband cigarettes), *§§2421-24* (slave traffic), (C) any act which is indictable under title *29, United States Code, §186* (restrictions on payments and loans to labor organizations) or *§501(c)* (embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under *§157* **[*40]** of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in *§102* of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, *§ 274* (bringing in and harboring certain aliens), *§ 277* (aiding or assisting certain aliens to enter the United States), or *§278* (importation of alien for immoral purpose) if the act indictable under such of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in *§2332b(g)(5)(B)*.

for Sanctions. In support of their motion, they cite LR 7.1(i) which permits the Court to impose sanctions on a litigant for filing a frivolous motion or opposing a motion on frivolous grounds. Plaintiff is a *pro se* litigant and his pleadings are therefore held to a less stringent standard than the Court would apply to pleadings filed by a lawyer. *Franklin v. Rose, 765 F.2d 82, 84-85 (6th Cir. 1985)* (citing *Haines, 404 U.S. at 520*). This liberal standard does not exempt the plaintiff from meeting basic pleading and jurisdictional requirements which result in dismissal of his action; however, it does advise against sanctioning him for failing to comprehend the concepts of venue or *res judicata*.

Having said that, the Court recognizes that the plaintiff's litigation efforts are becoming vexatious. While, the Court is very tolerant of legal filings from *pro se* litigants, it will not permit any litigant to use the Court's resources to address filings **[*43]** which are clearly designed to harass the Court or opposing parties. Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs the ability to carry out Article III functions. *Procup v. Strickland, 792 F.2d 1069, 1073 (11th Cir. 1986)*. Indeed, this Court has the responsibility to prevent litigants from unnecessarily encroaching on judicial machinery needed by others. *Id*. To achieve these ends, the Sixth Circuit Court of Appeals has approved enjoining vexatious and harassing litigants by requiring them to obtain leave of court before submitting additional filings. *Filipas v. Lemons, 835 F.2d 1145 (6th Cir. 1987)*; *Wrenn v. Vanderbilt Univ. Hosp., Nos. 94-5453, 94-5593, 1995 U.S. App. LEXIS 5470, 1995 WL 111480 (6th Cir. Mar. 15, 1995)* (authorizing a court to enjoin harassing litigation under its inherent authority and the All Writs Act, *28 U.S.C. § 1651(a)* (citations omitted)). This action was improperly filed in the Northern District of Ohio for what appears to be the purpose of continuing to litigate a matter already decided in the state courts. It is being dismissed on that basis. Plaintiff is cautioned that continued efforts to file patently **[*44]** frivolous or repetitive documents or motions may result in sanctions being issued against him. The defendants' motion for sanctions is denied without prejudice.

Conclusion

For all the foregoing reasons, this action is dismissed pursuant to *28 U.S.C. § 1915(e)*. The Court certifies, pursuant to *28 U.S.C. § 1915(a)(3)*, that an appeal from this decision could not be taken in good faith.[3]

IT IS SO ORDERED.

Dated: February 22, 2013

/s/ Sara Lioi

HONORABLE SARA LIOI

UNITED STATES DISTRICT JUDGE

End of Document

[3] ***28 U.S.C. § 1915(a)(3)*** provides, in pertinent part:

> An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

Galaria v. Nationwide Mut. Ins. Co.

United States Court of Appeals for the Sixth Circuit

September 12, 2016, Filed

File Name: 16a0526n.06

Nos. 15-3386/3387

Reporter
2016 U.S. App. LEXIS 16840 *; 663 Fed. Appx. 384; 2016 FED App. 0526N (6th Cir.); 2016 WL 4728027

MOHAMMAD S. GALARIA (15-3386); ANTHONY HANCOX (15-3387), individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. NATIONWIDE MUTUAL INSURANCE COMPANY, Defendant-Appellee.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: **[*1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Galaria *v. Nationwide Mut. Ins. Co., 998 F. Supp. 2d 646, 2014 U.S. Dist. LEXIS 23798 (S.D. Ohio, 2014)*

Counsel: For ANTHONY HANCOX, individually and on behalf of all others similarly situated, Plaintiff - Appellant (15-3387): Ben Barnow, Erich Schork, Barnow & Associates, Chicago, IL; Richard Lyle Coffman, Law Offices, Beaumont, TX.

For NATIONWIDE MUTUAL INSURANCE COMPANY, an Ohio Corporation, Defendant - Appellee (15-3387): Michael Hiram Carpenter, Jennifer A.L. Battle, Michael Nathaniel Beekhuizen, Amber Lea Merl, Carpenter, Lipps & Leland, Columbus, OH; Mark P. Szpak, Ropes & Gray, Boston, MA.

For MOHAMMAD S. GALARIA, individually and on behalf of all others similarly situated, Plaintiff - Appellant (15-3386): Ben Barnow, Erich Schork, Barnow & Associates, Chicago, IL.

For NATIONWIDE MUTUAL INSURANCE COMPANY, Defendant - Appellee (15-3386): Michael Hiram Carpenter, Jennifer A.L. Battle, Michael Nathaniel Beekhuizen, Amber Lea Merl, Carpenter, Lipps & Leland, Columbus, OH; Mark P. Szpak, Ropes & Gray, Boston, MA.

Judges: BEFORE: BATCHELDER and WHITE, Circuit Judges; LIPMAN, District Judge.* ALICE M. BATCHELDER, Circuit Judge, dissenting.

Opinion by: HELENE N. WHITE

Opinion

HELENE N. WHITE, Circuit Judge. Plaintiffs Mohammad Galaria and Anthony Hancox brought these putative class actions after hackers breached the computer network of Defendant Nationwide Mutual Insurance Company and stole their personal information. In their complaints, Plaintiffs allege claims for invasion of privacy, negligence, bailment, and violations of the *Fair Credit Reporting Act (FCRA)*. The district court dismissed the complaints, concluding that Plaintiffs failed to state a claim for invasion of privacy, lacked Article III standing to bring the negligence and bailment claims, and lacked statutory standing to bring the FCRA claims. In this consolidated appeal, Plaintiffs challenge the dismissal of the negligence, bailment, and

*The Honorable Sheryl H. Lipman, United States District Judge for the Western **[*2]** District of Tennessee, sitting by designation.

FCRA claims. Because we conclude that Plaintiffs have Article III standing and that the district court erred in dismissing the FCRA claims for lack of subject-matter jurisdiction, we **REVERSE** and **REMAND** for further proceedings.

I. Background

As alleged in the complaints, Nationwide is an insurance and financial-services company that maintains records containing sensitive personal information about **[*3]** its customers, as well as potential customers who submit their information to obtain quotes for insurance products. The data include names, dates of birth, marital statuses, genders, occupations, employers, Social Security numbers, and driver's license numbers. On October 3, 2012, hackers broke into Nationwide's computer network and stole the personal information of Plaintiffs and 1.1 million others.

Nationwide informed Plaintiffs of the breach in a letter that advised taking steps to prevent or mitigate misuse of the stolen data, including monitoring bank statements and credit reports for unusual activity. To that end, Nationwide offered a year of free credit monitoring and identity-fraud protection of up to $1 million through a third-party vendor. Nationwide also suggested that Plaintiffs set up a fraud alert and place a security freeze on their credit reports. However, Nationwide's website explained that a security freeze could impede consumers' ability to obtain credit, and could cost a fee between $5 and $20 to both place and remove. Nationwide did not offer to pay for expenses associated with a security freeze.

Plaintiff Hancox filed a five-count putative class-action complaint **[*4]** against Nationwide in the United States District Court for the District of Kansas, and Plaintiff Galaria filed essentially the same complaint in the United States District Court for the Southern District of Ohio a month later. The Kansas district court transferred Hancox's action to the Ohio district court, which designated the dockets as related. In Counts I and II of the complaints, Plaintiffs allege that Nationwide willfully and negligently violated the *Fair Credit Reporting Act (FCRA)*, *Pub. L. No. 91-508, 84 Stat. 1114 (1970)* (codified at *15 U.S.C. § 1681*), by failing to adopt required procedures to protect against wrongful dissemination of Plaintiffs' data. In Counts III, IV, and V, Plaintiffs allege claims for negligence, invasion of privacy by public disclosure of private facts, and bailment, which also arose out of Nationwide's failure to secure Plaintiffs' data against a breach.

In support of their claims, Plaintiffs allege that there is an illicit international market for stolen data, which is used to obtain identification, government benefits, employment, housing, medical services, financial services, and credit and debit cards. Identity thieves may also use a victim's identity when arrested, resulting in warrants issued in the **[*5]** victim's name. According to the complaints, the Nationwide data breach created an "imminent, immediate and continuing increased risk" that Plaintiffs and other class members would be subject to this kind of identity fraud. R. 1, PID 3. Plaintiffs cite a study purporting to show that in 2011 recipients of data-breach notifications were 9.6 times more likely to experience identity fraud, and had a fraud incidence rate of 19%.

Plaintiffs allege that victims of identity theft and fraud will "typically spend hundreds of hours in personal time and hundreds of dollars in personal funds," incurring an average of $354 in out-of-pocket expenses and $1,513 in total economic loss. *Id.*, PID 13. To mitigate this risk, Plaintiffs "have suffered, and will continue to suffer" costs—both "financial and temporal"—that include "purchasing credit reporting services, purchasing credit monitoring and/or internet monitoring services, frequently obtaining, purchasing and reviewing credit reports, bank statements, and other similar information, instituting and/or removing credit freezes and/or closing or modifying financial accounts." *Id.* The complaints seek damages for, among other things, the increased risk **[*6]** of fraud; expenses incurred in mitigating risk, including the cost of credit freezes, insurance, monitoring, and other mitigation products; and time spent on mitigation efforts.

The district court granted Nationwide's motion to dismiss the complaints. First, the district court concluded that Plaintiffs did not have "statutory standing" under the FCRA and thus dismissed the FCRA claims for lack of subject-matter jurisdiction. R. 40, PID 408. Next, the district court addressed whether Plaintiffs had Article III standing to bring their negligence and bailment claims, concluded that Plaintiffs had not alleged a cognizable injury, and dismissed the claims for lack of jurisdiction. Lastly, the district court concluded that Plaintiffs had standing to bring their invasion-of-privacy claim but failed to state a claim for relief, and dismissed that claim with prejudice.

Plaintiffs moved for reconsideration and leave to amend, asserting that the district court erred in dismissing one of their FCRA claims. Plaintiffs did not seek reconsideration of the other four dismissed claims,

which were omitted from the proposed amended complaint, but maintained their right to appeal the dismissals. Notably, **[*7]** the proposed amended complaint includes a new allegation that Plaintiff Galaria discovered three unauthorized attempts to open credit cards in his name. After checking with the credit-card companies, he learned that applications to open cards had been made using his name, Social Security number, and date of birth. The district court denied reconsideration and leave to amend, concluding that Plaintiffs had not demonstrated a clear error of law, and that the proposed amendment would not cure any deficiencies in the FCRA claim in any event.

Plaintiffs appeal the dismissal of their FCRA, negligence, and bailment claims for lack of jurisdiction, and the denial of their motions for reconsideration and leave to amend. Plaintiffs do not appeal the dismissal of their invasion-of-privacy claim.

II. Discussion

A. Article III standing

We review de novo the district court's determination of Article III standing. *McKay v. Federspiel, 823 F.3d 862, 866 (6th Cir. 2016)*. "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,'" and "[t]he doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014)* (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*). The Supreme Court has explained that "the 'irreducible **[*8]** constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)* (quoting *Lujan, 504 U.S. at 560*). A plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of a defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*

The plaintiff "bears the burden of showing that he has standing," *Summers v. Earth Island Institute, 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)*, and "[e]ach element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *Fair Elections Ohio v. Husted, 770 F.3d 456, 459 (6th Cir. 2014)* (quoting *Lujan, 504 U.S. at 561*). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo, 136 S. Ct. at 1547* (quoting *Warth v. Seldin, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*). The court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Parsons v. U.S. Dep't of Justice, 801 F.3d 701, 710 (6th Cir. 2015)* (quoting *Warth, 422 U.S. at 501*).

Injury is "the '[f]irst and foremost' of standing's three elements." *Spokeo, 136 S. Ct. at 1547* (quoting *Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id. at 1548* (quoting *Lujan, 504 U.S. at 560*). Where plaintiffs **[*9]** seek to establish standing based on an imminent injury, the Supreme Court has explained "that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147, 185 L. Ed. 2d 264 (2013)* (emphasis in original) (quoting *Whitmore v. Arkansas, 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)*). However, the Supreme Court has also "found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm," even where it is not "literally certain the harms they identify will come about." *Id. at 1150 n.5* (citing cases).

Here, Plaintiffs' allegations of a substantial risk of harm, coupled with reasonably incurred mitigation costs, are sufficient to establish a cognizable Article III injury at the pleading stage of the litigation. Plaintiffs allege that the theft of their personal data places them at a continuing, increased risk of fraud and identity theft beyond the speculative allegations of "possible future injury" or "objectively reasonable likelihood" of injury that the Supreme Court has explained are insufficient. *Clapper, 133 S. Ct. at 1147-48*. There is no need for speculation where Plaintiffs allege that their data has already been stolen and is now in the hands of ill-intentioned **[*10]** criminals. Indeed, Nationwide seems to recognize the severity of the risk, given its offer to provide credit-monitoring and identity-theft protection for a full year. Where a data breach targets personal information, a reasonable inference can be drawn that the hackers will use the victims' data for the fraudulent purposes alleged in Plaintiffs' complaints.

Thus, although it might not be "literally certain" that Plaintiffs' data will be misused, *id. at 1150 n.5*, there is a sufficiently substantial risk of harm that incurring mitigation costs is reasonable. Where Plaintiffs already know that they have lost control of their data, it would be unreasonable to expect Plaintiffs to wait for actual misuse—a fraudulent charge on a credit card, for example—before taking steps to ensure their own personal and financial security, particularly when Nationwide recommended taking these steps. And here, the complaints allege that Plaintiffs and the other putative class members must expend time and money to monitor their credit, check their bank statements, and modify their financial accounts. Although Nationwide offered to provide some of these services for a limited time, Plaintiffs allege that the risk is continuing, **[*11]** and that they have also incurred costs to obtain protections—namely, credit freezes—that Nationwide recommended but did not cover. This is not a case where Plaintiffs seek to "manufacture standing by incurring costs in anticipation of non-imminent harm." *Id. at 1155*. Rather, these costs are a concrete injury suffered to mitigate an imminent harm, and satisfy the injury requirement of Article III standing.[1]

This conclusion is in line with two recent decisions from the Seventh Circuit **[*12]** addressing standing in data-breach cases. In *Remijas v. Neiman Marcus Group, LLC, 794 F.3d 688 (7th Cir. 2015)*, the court held that victims of a data breach at a department store had established injury-infact by alleging a "substantial risk of harm" from the theft of their data. *Id. at 693*. The court explained: "Why else would hackers break into a store's database and steal consumers' private information? Presumably, the purpose of the hack is, sooner or later, to make a fraudulent charge or assume those consumers' identities." *Id.* The court reached the same conclusion in *Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963 (7th Cir. 2016)*, where restaurant customers' credit-card data was stolen in a data breach, because a "primary incentive" for a breach is to commit fraud. *Id. at 965, 967*.[2] The Ninth Circuit similarly found Article III standing in *Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010)*, where employees brought suit after a thief stole a company laptop containing their personal information. *Id. at 1141-43*.

The Third Circuit reached a different conclusion in *Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011)*. In *Reilly*, a hacker broke **[*13]** into a payroll processor's network, but it was not clear "whether the hacker read, copied, or understood" the personal data stored on the system. *Id. at 40, 44*. The plaintiffs—whose data was in the system—alleged standing based on an increased risk of identity theft, but the court concluded that the injuries were too speculative because there would be an injury only "*if* the hacker read, copied, and understood the hacked information, and *if* the hacker attempts to use the information, and *if* he does so successfully." *Id. at 43*. The Third Circuit also distinguished the case from data-breach cases where courts found standing: "Here, there is no evidence that the intrusion was intentional or malicious. . . . Indeed, no identifiable taking occurred; all that is known is that a firewall was penetrated." *Id. at 44*. Thus, *Reilly* is not on point where, as here, Plaintiffs allege an "identifiable taking"—the intentional theft of their data.[3]

Next, Plaintiffs' injury must also be "'fairly traceable' to the conduct being challenged." *Wittman v. Personhuballah, 136 S. Ct. 1732, 1736, 195 L. Ed. 2d 37 (2016)* (quoting *Lujan, 504 U.S. at 560-61*). This element of standing "is not focused on whether the

---

[1] The allegation in the proposed amended complaint that Plaintiff Galaria suffered three unauthorized attempts to open credit cards in his name further supports standing. However, Plaintiffs did not seek reconsideration of the district court's dismissal of their negligence and bailment claims for lack of Article III standing, and did not seek leave to amend the complaint for the purpose of bolstering the allegations in support of standing. The district court could not have abused its discretion in denying reconsideration and leave to amend for reasons that Plaintiffs expressly disclaimed. *See generally Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv., 616 F.3d 612, 615-16 (6th Cir. 2010)* (discussing the relevant standards). Regardless, we conclude that the allegations in the initial complaint are sufficient.

[2] *Remijas* and *Lewert* both cite the Supreme Court's decision in *Clapper v. Amnesty International USA, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)*, for the proposition that an "objectively reasonable likelihood" of injury is sufficient to support standing, *Lewert, 819 F.3d at 966*; *Remijas, 794 F.3d at 693*, but *Clapper* expressly rejects that standard. *133 S. Ct. at 1147*. However, these references were not critical to the reasoning or outcome of either case.

[3] To the extent *Reilly* suggests that more is required at the pleading stage, we find it unpersuasive. We must accept as true Plaintiffs' allegations about the nature of the breach and the data stolen, and construe the complaints in Plaintiffs' favor. *Parsons, 801 F.3d at 710*. These allegations might not be borne **[*14]** out by discovery, but are plausible, based on rational inferences from known facts, and are sufficient to survive a motion to dismiss.

defendant 'caused' the plaintiff's injury in the liability sense," *Wuliger v. Mfrs. Life Ins. Co., 567 F.3d 787, 796 (6th Cir. 2009)*, because "causation to support standing is not synonymous with causation sufficient to support a claim." *Parsons, 801 F.3d at 715*. Indeed, the Supreme Court has made clear that "[p]roximate causation is not a requirement of Article III standing." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1391 n.6, 188 L. Ed. 2d 392 (2014)*. "To that end, the fact that an injury is indirect does not destroy standing as a matter of course." *Parsons, 801 F.3d at 713*; *see also Warth, 422 U.S. at 504*. Rather, the traceability requirement mainly serves "to eliminate those cases in which a third party and not a party before the court causes the injury." *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536, 542 (6th Cir. 2004)*.

Here, Plaintiffs sufficiently allege that their injuries are fairly traceable to Nationwide's conduct. For example, Plaintiffs allege that Defendants failed "to establish and/or implement appropriate administrative, technical and/or physical safeguards to ensure the security and confidentiality of Plaintiff's and other Class Members' [data] to protect against **[*15]** anticipated threats to the security or integrity of such information." R. 1, PID 11-12. Although hackers are the direct cause of Plaintiffs' injuries, the hackers were able to access Plaintiffs' data only because Nationwide allegedly failed to secure the sensitive personal information entrusted to its custody. In other words, but for Nationwide's allegedly lax security, the hackers would not have been able to steal Plaintiffs' data. These allegations meet the threshold for Article III traceability, which requires "more than speculative but less than but-for" causation. *Parsons, 801 F.3d at 714*.

This conclusion is consistent with the Eleventh Circuit's decision in *Resnick v. AvMed, Inc., 693 F.3d 1317, 1324 (11th Cir. 2012)*, which held that injuries from a data breach were fairly traceable to a defendant that failed to secure laptops that were then stolen. The Seventh and Ninth Circuit have also found the traceability requirement met in similar data-breach cases. *Lewert, 819 F.3d at 969*; *Remijas, 794 F.3d at 696*; *Krottner, 628 F.3d at 1141*. Further, in *Lambert v. Hartman, 517 F.3d 433, 438 (6th Cir. 2008)*, we held that identity theft was fairly traceable to a defendant that mishandled the plaintiff's personal data by releasing it online. True, the plaintiff in *Lambert* alleged conduct more egregious than the general allegations of inadequate security presented in Plaintiffs' complaints; but **[*16]** at the pleading stage, we "presume[] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*.

Lastly, Plaintiffs must show that their injury "will likely be 'redressed' by a favorable decision." *Wittman, 136 S. Ct. at 1736* (quoting *Lujan, 504 U.S. at 560-61*). Here, Plaintiffs seek compensatory damages for their injuries, and a favorable verdict would provide redress.

Thus, we conclude that Plaintiffs' complaints adequately allege Article III standing. Nationwide argues in the alternative that the dismissal of the negligence and bailment claims should nonetheless be affirmed on the basis that Plaintiffs failed to state claims for relief. However, because the district court dismissed for lack of jurisdiction, we decline to grant a dismissal on the merits on appeal.

B. Statutory standing under the FCRA

We review de novo the district court's dismissal of Plaintiffs' FCRA claims for lack of subject-matter jurisdiction. *Askins v. Ohio Dep't of Agric., 809 F.3d 868, 872 (6th Cir. 2016)*. The district court concluded that the complaints allege a violation of the FCRA's statement of purpose rather than a substantive provision of the statute, and dismissed the FCRA claims for lack of statutory standing.

The Supreme Court has explained that the term "statutory standing" describes **[*17]** an inquiry into the question whether a plaintiff "falls within the class of plaintiffs whom Congress has authorized to sue" and therefore "has a cause of action under the statute." *Lexmark, 134 S. Ct. at 1387-88 & n.4*. However, this label is "misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case.'" *Id.* (emphasis in original) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 642-43, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)*); *see also Facione v. CHL Mortg. Trust 2006-J1, 628 Fed. Appx. 919, 920 (6th Cir. 2015)* (noting the "confusion" caused by the term "statutory standing"). The question whether Plaintiffs have a cause of action is a merits issue that is "analytically distinct from the question whether a federal court has subject-matter jurisdiction." *Roberts v. Hamer, 655 F.3d 578, 580 (6th Cir. 2011)*. If a plaintiff lacks statutory standing—in other words, does not have a cause of action—the proper course is to dismiss for failure to state a claim. *Id. at 581*.

Thus, the district court erred in concluding that it lacked subject-matter jurisdiction over the FCRA claims. As discussed, Plaintiffs have Article III standing to bring this action,[4] and we see no other jurisdictional defect; the district court's contrary conclusion was based on an assessment **[*18]** of the merits. We go no further than reversing the district court's judgment as to its jurisdiction, and decline to address the merits issue on appeal. Instead, we return this question to the district court, which may dismiss for failure to state a claim if it concludes that Plaintiffs do not have a cause of action under the FCRA.

III. Conclusion

For these reasons, we **REVERSE** the dismissal of Plaintiffs' negligence, bailment, and FCRA claims for lack of subject-matter jurisdiction and **REMAND** for further proceedings.

Dissent by: ALICE M. BATCHELDER

Dissent

ALICE M. BATCHELDER, Circuit Judge, dissenting. I disagree with the majority's conclusion that the complaints have adequately pled a causal connection between Nationwide's alleged inaction and the plaintiffs' alleged injury, which is necessary to establish Article III standing. As the plaintiffs have not satisfied this fundamental requirement of federal **[*19]** court jurisdiction, I would affirm the district court's dismissal of their consolidated suit.

We need not take sides in the existing circuit split regarding whether an increased risk of identity theft is an Article III injury because, even assuming that it is, the plaintiffs have failed to demonstrate the second prong of Article III standing—causation. The causation element requires "a causal connection between the injury and the [defendant's] conduct"—in other words, the injury must "be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (alterations omitted) (quoting *Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)*). Intervening third party action generally defeats a plaintiff's standing. *See, e.g., Binno v. Am. Bar Ass'n, 826 F.3d 338, 2016 WL 3349212, at *3 (6th Cir. 2016)* (rejecting a law school applicant's constitutional standing to sue the ABA when his injury was actually caused by law school admissions offices and the administrators of the LSAT); *Ammex, Inc. v. United States, 367 F.3d 530, 534 (6th Cir. 2004)* (holding that a plaintiff could not sue the federal government to recover fuel taxes the government assessed on the plaintiff's suppliers, because the suppliers had discretion to pass on the cost of the tax and "any alleged injury . . . was not occasioned by **[*20]** the Government"). If Galaria and Hancox suffered injury, it was at the hands of criminal third-party actors, and their complaints do not make the factual allegations necessary to fairly trace that injury to Nationwide.

At the motion-to-dismiss stage, the plaintiffs bear the same burden to plead the elements of Article III standing as they do to plead the elements of their cause of action. *See Lujan, 504 U.S. at 561*. Although "detailed factual allegations" are not required, the complaints must contain more than "'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*); *see also White v. United States, 601 F.3d 545, 552-53 (6th Cir. 2010)* (applying *Iqbal* pleading requirements to allegations supporting Article III standing). The allegations must "nudge[]" the plaintiffs' basis for standing "across the line from conceivable to plausible." *Twombly, 550 U.S. at 570*.

Here, the complaints lack any factual link between Nationwide and the plaintiffs' alleged injury. The complaints simply allege that hackers were in fact able to access the plaintiffs' personal information. From that fact, the complaints conclude that Nationwide failed to protect that information. But plaintiffs make no factual allegations regarding how the hackers were able to breach Nationwide's system, nor do they **[*21]** indicate what Nationwide might have done to prevent that breach but failed to do.[1] In short, there is no allegation

[4] The Supreme Court has explained that FCRA claims may present Article III standing questions where the alleged FCRA violation is procedural in nature and the plaintiff suffers no harm. *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)*. However, the district court did not address that question, and Plaintiffs have alleged an Article III injury in any event.

[1] The majority cites to paragraph 32 of the complaints, which alleges that Nationwide "flagrantly disregarded and/or violated

of fact in either complaint that makes plausible the notion that Nationwide is at all responsible for the criminal acts that increased the plaintiffs' risk of identity theft.

This case is distinguishable from those cases in which we have found Article III standing notwithstanding the intervening action of a third party. Nationwide's alleged but unspecified negligence did not "motivate" the hacker's criminal activity, *see* Parsons v. U.S. Dep't of Justice, 801 F.3d 701, 714 (6th Cir. 2015), nor have the plaintiffs alleged any direct link between the hacker's successful crime **[*22]** and an action of Nationwide, Lambert v. Hartman, 517 F.3d 433, 437-38 (6th Cir. 2008). Although a plaintiff need not prove that one particular actor out of many caused his harm, here the plaintiffs do not even allege wrongdoing by Nationwide that *might have* caused their harm. *See* Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536, 543 (6th Cir. 2004) (holding that a plaintiff could meet standing requirements at the pleading stage by alleging that the defendant was polluting and that the plaintiff was harmed by the pollution, even if other third-party actors were also polluting).

Lambert is particularly notable. A county clerk of court published Cynthia Lambert's personal information on the internet by making public a traffic citation Lambert had received. 517 F.3d at 435. A criminal used this information to obtain a false driver's license and make multiple purchases in Lambert's name. Id. at 435. Lambert sued the clerk and the county for the violation of her privacy rights, but the defendants attacked her standing "on the basis that her injuries [were] not fairly traceable to the Clerk's website." Id. at 437. The court rejected this argument; although the defendants were not "the *direct* cause of Lambert's injuries," the plaintiff specifically linked the act of identity theft to the Clerk's website through two factual allegations: (1) the driver's **[*23]** license number on the traffic citation was incorrect by one digit, the same incorrect number on false driver's license used to steal Lambert's identity; and (2) the identity thief—who was caught—admitted obtaining the information from the website. Id. at 437-38.

Galaria and Hancox's alleged injury is an increased risk of identity theft, not the theft itself as in *Lambert*. But they still need to allege facts establishing a causal link between that increased risk and something Nationwide did or did not do. Accusing Nationwide of "failing to establish and/or implement appropriate . . . safeguards . . . to protect" customers' personal information, without more, is insufficient to "allow[] the court to draw the reasonable inference" that the breach is fairly traceable to Nationwide. Iqbal, 556 U.S. at 678. It is just another way of saying that Nationwide didn't prevent the data breach. But *no one* prevented the data breach; this hardly means that the plaintiffs have standing to sue the FBI or the Ohio Attorney General for not thwarting the hackers' criminal activities. To establish standing, the plaintiffs must make some factual allegation of a *causal* connection. This they have failed to do.

The majority manufactures this causal **[*24]** connection on the plaintiffs' behalf, stating that "but for Nationwide's allegedly lax security, the hackers would not have been able to steal Plaintiffs' data." Nowhere does either complaint allege but-for causation. And although the majority is correct that but-for causation is not required for Article III standing, the plaintiffs' allegations here are nothing more than sheer speculation. *See* Parsons, 801 F.3d at 714.

Other circuits' contrary decisions in similar cases completely ignore the independent third party criminal action breaking the chain of causation. For example, the Eleventh Circuit held that plaintiffs satisfied the fairly traceable requirement by alleging only that the defendant "failed to secure [the plaintiffs'] information on company laptops, and that those laptops were subsequently stolen."[2] Resnick v. AvMed, Inc., 693 F.3d 1317, 1324 (11th Cir. 2012). And in *Remijas v. Neiman Marcus Group, LLC*, the Seventh Circuit overlooked the absence of any allegation that Neiman Marcus had specifically done anything that made the data breach easier or had failed to do anything that could have prevented it. 794 F.3d 688, 696 (7th Cir. 2015). The court did not explain how the risk of identity theft could be fairly traceable to Neiman Marcus when that risk was in fact the result of third party **[*25]** criminal action. *See also* Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963, 969 (7th Cir. 2016) (ignoring the intervening third party action between the defendant hacked company

---

[the plaintiffs'] privacy rights, and harmed them in the process, by failing to establish and/or implement appropriate administrative, technical and/or physical safeguards to ensure the security and confidentiality of [the plaintiffs' personal information and] to protect against anticipated threats to the security or integrity of such information." This is a conclusory statement, not a factual allegation entitled to a presumption of truth. *See* Iqbal, 556 U.S. at 680-81.

[2] Even this is more specific than what the plaintiffs have pled here.

and the plaintiffs' injury). We should not make this same mistake.

The majority sends the case back to the district court for analysis of Nationwide's motion to dismiss for failure to state a claim. Even were I to conclude that we have jurisdiction over this case, I do not believe a remand is necessary. The plaintiffs have not stated a claim for relief under the FCRA, because the complaint does not allege facts establishing that Nationwide is a "consumer reporting agency" or that Nationwide "furnished" a "consumer report" within the statutory definitions. *See, e.g.*, *Dolmage v. Combined Ins. Co. of Am., No. 14 C 3809, 2015 U.S. Dist. LEXIS 6824, 2015 WL 292947, at *3-4 (N.D. Ill. Jan. 21, 2015)*; *Burton v. MAPCO Express, Inc., 47 F. Supp. 3d 1279, 1286-87 (N.D. Ala. 2014)*; *see also Washington v. CSC Credit Servs. Inc., 199 F.3d 263, 265 (5th Cir. 2000)* ("[T]he FCRA governs 'consumer reporting agencies' like Equifax and CSC [Credit Services] which maintain credit information on consumers and provide it to third parties."). And the plaintiffs have certainly not alleged the level of causation necessary to plead a claim of negligence. *See Whiting v. Ohio Dep't of Mental Health, 141 Ohio App. 3d 198, 750 N.E.2d 644, 647 (Ohio Ct. App. 2001)* (quoting *Strother v. Hutchinson, 67 Ohio St. 2d 282, 423 N.E.2d 467, 470-71 (Ohio 1981))* ("'[P]roximate cause' is generally established 'where [a negligent] act . . . in a natural and continuous sequence, produces a result that would not have taken **[*26]** place without the act.'").

I respectfully dissent.

End of Document

LexisNexis

In re Commercial Money Ctr., Inc., Equip. Lease Litig.

United States District Court for the Northern District of Ohio, Eastern Division

June 17, 2011, Decided; June 17, 2011, Filed

MDL Case No. 1:02CV16000; MDL Docket No. 1490; Case No. 02CV16017

Reporter
2011 U.S. Dist. LEXIS 64342 *; 2011 WL 2461335

IN RE: COMMERCIAL MONEY CENTER, INC., EQUIPMENT LEASE LITIGATION; THE HUNTINGTON NATIONAL BANK, Plaintiff, v. AMERICAN MOTORISTS INSURANCE COMPANY, Defendant. AMERICAN MOTORISTS INSURANCE COMPANY, Third-Party Plaintiff, v. BLAINE TANNER, GUARDIAN CAPITAL XVI, LLC, and GUARDIAN SHIELD HOLDINGS, LTD., Third-Party Defendants.

Subsequent History: Findings of fact/conclusions of law at *JPMorgan Chase Bank, N.A. v. Safeco Ins. Co. of Am. (In re Commercial Money Ctr., Inc.), 2011 U.S. Dist. LEXIS 91179 (N.D. Ohio, Aug. 16, 2011)*

Prior History: *In re Commercial Money Ctr., 2010 U.S. Dist. LEXIS 107187 (N.D. Ohio, Oct. 6, 2010)*

Counsel: **[*1]** For Huntington National Bank, Plaintiff: Martha S. Sullivan, Stephen M. Fazio, LEAD ATTORNEYS, Squire, Sanders & Dempsey (US) - Cleveland, Cleveland, OH; Daniel C. Mazanec, Squire, Sanders & Dempsey (US) - Miami, Miami, FL.

For American Motorists Insurance Company, 3rd Party Plaintiff: Amy Hull Carey, LEAD ATTORNEY, Taft, Stettinius & Hollister, Cleveland, OH; Christian J. Gascou, Ronald W. Hopkins, LEAD ATTORNEYS, Gascou Hopkins, Los Angeles, CA; David H. Wallace, LEAD ATTORNEY, Taft Stettinius & Hollister - Cleveland, Cleveland, OH.

For Blaine Tanner, Guardian Capital XVI, LLC, Guardian Shield Holdings, Ltd., 3rd Pty Defendants, Counter-Claimants: Christopher M. Vlasich, LEAD ATTORNEY, Park Ridge, IL; Joel Levin, LEAD ATTORNEY, Aparesh Paul, Levin & Associates, Cleveland, OH.

For American Motorists Insurance Company, Counter-Defendant: Christian J. Gascou, Gascou Hopkins, Los Angeles, CA.

Judges: KATHLEEN McDONALD O'MALLEY, UNITED STATES DISTRICT JUDGE.

Opinion by: KATHLEEN McDONALD O'MALLEY

Opinion

MEMORANDUM OF OPINION AND ORDER

This action is before the Court upon a renewed motion by American Motorists Insurance Company ("AMICO") to transfer venue of this action to the Southern District of California. (02-16017, **[*2]** Doc. 74). AMICO previously filed a similar motion requesting transfer of this action (02-16017, Doc. 57). For the reasons set forth in the Court's Memorandum and Order issued on March 2, 2007 (02-16017, Doc. 67), however, the Court reserved ruling on AMICO's prior venue transfer motion.

AMICO filed the instant motion on September 14, 2010, and opposition to the motion was filed on December 15, 2010 (02-16014, Doc. 77) by Guardian Capital XVI, LLC ("Guardian XVI"), Guardian Shield Holdings, Ltd. ("Guardian Shield") (collectively, the "Guardian Entities"), and Blaine Tanner (collectively with the Guardian Entities, "Guardian"). AMICO did not submit any reply papers. This motion is ripe for ruling, and the Court has considered the entirety of the submissions by all parties. For the reasons set forth herein, AMICO's motion to transfer venue is denied.

I. Procedural Background

This action originally was part of a group of actions

transferred to this Court by order of the Judicial Panel on Multidistrict Litigation ("the MDL Panel"), issued on October 25, 2002, pursuant to *28 U.S.C. § 1407*. (02-16000, Doc. 1). This Court ordered that these actions be coordinated for pretrial purposes. (02-16000, **[*3]** Doc. 2).

On October 6, 2010, the Court issued a Memorandum and Order finding that "all common fact and expert discovery is complete in these cases, and all case-wide issues amenable to resolution in this transferee court have been resolved. . . ." (02-16000, Doc. 2479). Following the Court's October 6, 2010 Memorandum and Order, various cases were remanded to their transferor districts for trial. The within action, however, was filed in this district and, accordingly, remains in this district for trial absent a ruling that transfer to another district is appropriate.

This action was filed on May 17, 2002 by Huntington National Bank ("Huntington"), asserting claims against AMICO and Anthony & Morgan Surety Company ("A&M"). (02-16017, Doc. 1). On July 12, 2002, AMICO filed an answer, denying proper venue in the Northern District of Ohio and asserting counterclaims against Huntington. (02-16017, Doc. 12). AMICO also asserted, as an affirmative defense, that venue of the action should be transferred to the Southern District of California. On December 18, 2002, AMICO filed an Amended Third-Party Complaint and Cross-Claim against Guardian. (02-16017, Doc. 33). Guardian filed an Answer and **[*4]** Counterclaims against AMICO on January 27, 2003. (02-16017, Doc. 37). AMICO's Answer to Guardian's counterclaims also denied proper venue in the Northern District of Ohio, and asserted that this matter should be transferred to California. (02-16017, Doc. 39).

On December 7, 2005, the parties filed a stipulation of dismissal, which reflected the settlement of all claims as between AMICO and Huntington. (02-16017, Doc. 50). Subsequently, by Order dated September 15, 2008, the Court granted a motion by AMICO for summary judgment on the counterclaims asserted against it by Guardian. (02-16000, Doc. 2209). Accordingly, the only claim remaining for determination in this action is AMICO's third-party claim against Guardian for fraud and rescission.

In February 2002, AMICO filed suit in the Southern District of California against CMC, Michael Anthony, and several individual CMC insiders. That action was consolidated in the MDL proceedings as *American Motorists Insurance Co. v. Commercial Money Center, Inc., et al.*, 1:02CV16003. Following issuance of this Court's October 6, 2010 Memorandum and Order, Case No. 02-16003 was remanded to the Southern District of California for trial by Order of the **[*5]** MDL Panel dated November 10, 2010 (02-16003, Doc. 23). As of the date of this Opinion, that action remains pending in the Southern District of California as Case No. 3:02CV00218. [1] AMICO asserts that the within action should be transferred to California, where it can proceed together with the pending related case.

II. Factual Background

The dispute in these actions involves the liability of the Sureties [2] on various surety bonds issued in connection with certain transactions between the Banks and Commercial Money Center, Inc. ("CMC"). CMC's business **[*6]** involved the leasing of equipment and vehicles to numerous lessees in exchange for lease payments. CMC then pooled the leases and sold them to institutional investors. CMC's leasing business collapsed in early 2002, and the Banks claim millions of dollars in losses from these transactions. The Banks have commenced these actions against the Sureties to recover on the surety bonds associated with the transactions. The Sureties raise CMC's fraud as a defense to the Banks' claims and seek to rescind the surety bond transactions based on fraud in the inducement.

The Guardian Entities are single-purpose entities, which were formed by a sole principal, Blaine Tanner, for the purpose of purchasing CMC lease pools. The Guardian Entities purchased a total of fourteen lease pools and, in order to consummate the purchases, secured loans

---

[1] In July 2002, AMICO also sued several banks in the Southern District of California. The bank suit was consolidated in the MDL proceedings as *American Motorists Insurance Co. v. United Security Bank*, 1:02CV16024. On July 1, 2009, counsel advised the Court that Case No. 02-16024 had been resolved. Although the parties apparently neglected to file a formal stipulation of dismissal, no further filings were made in the case, and the Court subsequently closed that case on May 25, 2011. (02-16024, Doc. 66). As a result, Case No. 02-16024 was not remanded to the Southern District of California for trial and will not be addressed further in this Opinion.

[2] Where not defined herein, capitalized terms used in this Opinion have the meanings ascribed to them in the Court's Consolidated Rulings issued August 19, 2005 (02-16000, Docs. 1708, 1709), and in the Bench Trial Opinion issued May 28, 2010 (02-16000, Doc. 2459).

from various banks. In most cases, the transactions were structured in such a way that payments to lenders **[*7]** were made from the income stream of the lease pools. Each lease pool, and/or its income stream, was guaranteed by one of the various Sureties involved in these actions.

This action involves two Guardian Entities, Guardian XVI and Guardian Shield (as well as their principal, Blaine Tanner). Huntington was the Guardian Entities' lender in connection with the transactions involved in this action. With respect to all of the lease pools that are the subject of this action, the surety was AMICO. In this transaction, Guardian XVI purchased lease income rights from CMC, and later assigned the lease income stream, and associated lease bonds, to Huntington. [3]

In this action, AMICO's third-party fraud claim against Guardian is based primarily upon an "anonymous warning letter" received by Guardian in February 2001. This letter, which the parties now agree was authored by Charles Whitfield (a former CMC employee) **[*8]** and mailed to Guardian from California, characterized CMC's lease bond program as a Ponzi scheme, and revealed certain questionable aspects of the personal backgrounds of CMC's principals. Mr. Whitfield's letter described prior fraudulent schemes by CMC's principals, and also accused broker Michael Anthony (principal of A&M) of participating with CMC in the lease bond scheme.

It is undisputed that, on February 13, 2001, Tanner faxed a copy of the Whitfield letter to Michael Anthony in southern California, along with a fax cover sheet including Tanner's handwritten note: "This person is tracking the UCC filings. Very bad." Tanner also concedes that he discussed the allegations contained in the Whitfield letter with both Michael Anthony and CMC principal Wayne Pirtle, via telephone calls to California. Subsequent to Guardian's receipt of the Whitfield letter, and without knowledge thereof, AMICO issued lease bonds to CMC in July 2001, and entered into a Sale and Servicing Agreement with CMC and Guardian XVI on September 7, 2001.

III. Discussion

AMICO requests that this action be transferred to the Southern District of California, arguing that (1) this action could have been brought there; **[*9]** (2) the majority of the events relevant to this litigation occurred there; (3) the majority of the key witnesses reside there; (4) related litigation already is pending there; and (5) California law applies to the relevant issues in this action. AMICO argues, essentially, that the center of the CMC fraud scheme, of which it alleges that Guardian had knowledge, was CMC's headquarters in San Diego County, California. Accordingly, AMICO urges, the Southern District of California is the appropriate venue for this action.

Guardian, on the other hand, opposes AMICO's motion, asserting that this action could not have been brought in California, because California lacks personal jurisdiction over the Guardian Entities and Tanner. Guardian further argues that, since a significant portion of the relevant events occurred in Ohio, AMICO cannot satisfy its burden of proof to demonstrate that transfer is warranted. Guardian argues, finally, that since the Northern District of Ohio is a proper venue, the Court should not interfere with the plaintiff's venue choice absent a showing of severe hardship to AMICO.

Transfer of venue in this matter is governed by *28 U.S.C. § 1404(a)*, which provides:

> For the **[*10]** convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a). In a diversity action, a district where a case might have been brought means "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . ." *28 U.S.C. § 1391(a)(2)*. The movant seeking transfer of the action bears the burden of demonstrating that the forum to which it seeks transfer "is the more convenient one vis a vis the plaintiffs' initial choice." *International Union, UAW v. ALCOA, 875 F. Supp. 430, 433 (N.D. Ohio 1995)*. *See also Bacik v. Peek, 888 F. Supp. 1405, 1414 (N.D. Ohio 1993)*(transfer appropriate only where balance of relevant factors weighs "strongly in favor of transfer.").

It is well established that finding a venue in which a case "might have been brought" requires a determination that the defendant would be subject to personal jurisdiction in the transferee court. *See, e.g., Travelers Cas. & Sur. Co. v. Phila. Reinsurance Corp.,*

---

[3] CMC initially assigned the lease income stream and bond rights in the pool to Guardian Shield and Sky Bank, N.A. ("Sky"), in order to permit CMC to access Guardian Shield's line of credit at Sky. Subsequently, CMC made a second assignment of its income stream and bond rights to Guardian XVI.

2001 U.S. Dist. LEXIS 10913, *13 (N.D. Ohio May 10, 2001). A defendant is subject to personal **[*11]** jurisdiction where such jurisdiction is permitted by the state's long-arm statute, and where the exercise of such jurisdiction does not violate due process. *See* Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). The California legislature has declared that California's long arm statute should be construed as extending to the limits of due process. *See* Cal. Code. Civ. Proc. § 410.10. Accordingly, personal jurisdiction over a defendant in California is appropriate where that defendant has minimum contacts with California "such that the assertion of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" *Pebble Beach Co., 453 F.3d at 1155*, *quoting* International Shoe Co. v. Washington, 326 U.S. 310, 315, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

The Ninth Circuit has articulated a three-part test to determine whether a defendant has the requisite "minimum contacts" to support the exercise of jurisdiction:

> (1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related activities, **[*12]** and (3) the exercise of jurisdiction is reasonable.

Pebble Beach Co., 453 F.3d at 1155, *quoting* Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000). The first prong is satisfied where a defendant purposefully engages in conduct in the forum, or the defendant's conduct outside the forum is purposefully directed to the forum. *See* Pebble Beach Co., 453 F.3d at 1156. Conduct by the defendant outside the forum must be intentional, expressly aimed at the forum state, and cause harm in the forum, which the defendant knows is likely to be suffered in the forum state. *See id.*

Once a court has determined that personal jurisdiction exists over the defendants, and thus that an action could have been brought in the district to which transfer is sought, the district court has discretion to consider the motion for transfer "according to an individualized, case-by-case consideration of convenience and fairness. . . ." Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)(internal quotations omitted). The Sixth Circuit has held that, "in ruling on a motion to transfer under §1404(a), a district court should consider the private interests of the parties, including their **[*13]** convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.'" *Moses v. Business Card Express, Inc., 929 F.2d 1131, 1137 (6th Cir. 1991)*, *quoting* Stewart Org., 487 U.S. at 30. In balancing the relevant private and public interest factors, the Court must consider the convenience of all parties, since "transfer of venue is inappropriate where it would serve only to transfer the inconvenience from one party to the other." *ALCOA, 875 F. Supp. at 433*.

The significant private interest factors a court must consider include "the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling witnesses; [and] the cost of obtaining attendance of unwilling witnesses . . . ." Rustal Trading US, Inc. v. Makki, 17 Fed. Appx. 331, 2001 U.S. App. LEXIS 19062, *10 (6th Cir. Aug. 21, 2001). In balancing these factors, the court should consider certain case-specific factors, including "(1) the nature of the suit; (2) the place of events involved; (3) relative ease of access to sources of proof; (4) nature and materiality of testimony to be elicited **[*14]** from witnesses who must be transported; and (5) residences of parties." Sirak v. J.P. Morgan Chase & Co., 2008 U.S. Dist. LEXIS 94328, *4 (N.D. Ohio Nov. 5, 2008), *citing* Centerville ALF, Inc. v. Balanced Care Corp., 197 F. Supp. 2d 1039, 1049-50 (S.D. Ohio 2002). Relevant public interest factors include the administrative burden of proceeding in courts with congested dockets; the burden of imposing jury duty on people of a community having no connection with the litigation; the desirability of holding a trial nearest to those affected most by it; and the appropriateness of holding a trial in a diversity case in a court most familiar with the governing law. *See* Sirak, 2008 U.S. Dist. LEXIS 94328, at *10-11.

Following the 1990 revision to the Federal Rules, proper venue of a case is not limited to the district that is the "best" venue, or in which the most substantial events gave rise to the claims at issue. *See* First of Michigan Corp. v. Bramlet, 141 F.3d 260, 263 (6th Cir. 1998). *See also* Setco Enters., Corp. v. Robbins, 19 F.3d 1278, 1280-81 (8th Cir. 1994)(courts "no longer ask which district . . . is the 'best' venue . . . . Rather, [they] ask whether the district the plaintiff **[*15]** chose had a substantial connection to the claim . . . ."). "The facts are not weighed to see which district has a more substantial connection to events giving rise to the action. So if a substantial part of the events occurred [in this district], venue would still be proper in this district even if a

majority of events occurred elsewhere." *Tranzonic Cos. v. Markowitz, 2005 U.S. Dist. LEXIS 9865, *3 (N.D. Ohio May 24, 2005)*(internal citations omitted). Finally, in determining venue transfer motions, this Court consistently has considered plaintiff's choice of venue as a factor, although not a factor "of paramount importance." *ALCOA, 875 F. Supp. at 433 (O'Malley, J.)*; *see also Fed. Ins. Co. v. CVS Revco D.S., Inc., 2009 U.S. Dist. LEXIS 56876, *16 (N.D. Ohio Jun. 16, 2009)*(O'Malley, J.)("this court has consistently treated the plaintiff's choice of forum as *one* of the relevant factors in the *§ 1404(a)* analysis, *i.e.*, it is a factor to be weighed equally with other relevant factors.")(emphasis in original; internal quotations omitted).

A. AMICO's Position

AMICO contends that, since this case could have been brought in the Southern District of California, the Court has discretion to conduct **[*16]** a balancing analysis and weigh the *section 1404* factors in determining its motion for transfer. According to AMICO, all of the *section 1404* factors weigh heavily in favor of transfer. AMICO contends that a "substantial part" of the events giving rise to Huntington's claims (and the related counterclaims and third-party claims) arose in California, since (1) both CMC and A&M operated out of southern California; (2) the lease bonds were issued and executed in that district; (3) leases were serviced out of CMC's offices in Escondido, California, and all lease documents were stored there pursuant to a contractual requirement; (4) CMC and CSC orchestrated and carried out their fraud from their offices in southern California; (5) Blaine Tanner contacted Michael Anthony, principal of A&M, in California regarding the CMC transactions, and came to California on several occasions to discuss the transactions, and to socialize with Michael Anthony; (6) Tanner received the Whitfield letter from California and forwarded that letter to California via fax to Michael Anthony; and (7) Tanner discussed the allegations contained in the Whitfield letter during phone discussions with Anthony and Pirtle **[*17]** in California.

AMICO also apparently relies on the extensive nature of the business dealings between the Guardian Entities and CMC, which did business primarily in California. AMICO points out that the Guardian Entities were formed for the specific purpose of doing business with CMC. AMICO asserts that, in connection with the CMC lease bond transactions, the Guardian Entities (1) borrowed money from CMC in order to pay the commitment fees and security deposits required by their lenders; and (2) set up a line of credit for CMC to access to fund leases, in exchange for payment of fees by CMC. For all of these reasons, AMICO contends, this case properly could have been commenced in the Southern District of California.

AMICO argues that both public and private interest factors in this case also weigh in favor of transfer to the Southern District of California. AMICO asserts that the vast majority of relevant witnesses—including a significant number of non-party witnesses—are located in California, and could be compelled to appear only in California. [4] AMICO lists numerous former employees of CMC, including Mark Fisher, Ron Fisher, Brian McMichael, Robin Jacobs, Eric McMichael, Keith Caneva, **[*18]** Bill Hanson, Kelly Fisher Buh, Dean Ambrosini, and Kitty Chisholm. AMICO also includes as relevant witnesses Michael Anthony and his staff; David Noddle (AMICO's California underwriter) and other California underwriting staff; Michael Huhn (AMICO's forensic accounting expert, who also is expected to testify in the related California case); CMC's bankruptcy trustee; and the accountant to CMC's bankruptcy trustee. While AMICO states the positions held by each of these individuals, it does not, in most cases, specifically describe the testimony that each witness is expected to provide.

According to AMICO, the only Ohio individual involved in these transactions was Blaine Tanner, who traveled to California on several occasions to meet with Anthony and CMC personnel. Moreover, AMICO asserts, Tanner now resides in Arizona, and could easily travel to California for trial.

AMICO further argues that the lease bonds and other transaction documents were drafted, negotiated, and executed in California, and that the lease files have been stored at CMC's office in Escondido. Moreover, AMICO argues, A&M **[*19]** maintained its documents at its offices in San Clemente, California.

AMICO argues, finally, that public interests, including judicial efficiency and local interest, favor transfer to California, since (1) the Court has found that, in the absence of an express choice-of-law provision, the transaction documents are governed by California law; (2) California law should apply to this case in any event, since California has the most significant relationship to the parties and the transaction; and (3) California has a stronger interest in uniformly interpreting the bonds,

---

[4] *See Fed. R. Civ. P. 45(b)(2)*.

which were issued in California to a California obligee (CMC).

B. Guardian's Position

Guardian argues, initially, that transfer to the Southern District of California is inappropriate because that district lacks jurisdiction over the Guardian Entities and Tanner, such that this action could not have been commenced in that district in the first instance. Guardian asserts that, since the only claim remaining in this action is AMICO's claim of fraud by the Guardian Entities and/or Tanner, then AMICO bears the burden of showing that those defendants—and not simply CMC—performed some act or engaged in conduct that would constitute **[*20]** purposeful availment of "the privileges of conducting activity in [California]." *Pebble Beach, 453 F.3d at 1155*.

Guardian asserts that the contacts between Tanner and/or the Guardian Entities and California are de minimis and, in any event, unrelated to the claims asserted by AMICO against these parties. Guardian argues that, although Tanner traveled to California in 1999 to conduct an initial investigation of the CMC opportunity, Tanner did not seriously begin to pursue the CMC opportunity until after he returned from California. According to Guardian, the vast majority of the negotiations conducted by Tanner (and/or his attorneys) in connection with the CMC transactions occurred via telephone or fax from Cleveland. Tanner and his attorneys reviewed draft documents, and made revisions to those documents, in Cleveland.

In any event, insofar as AMICO's fraud allegations arise from the alleged failure of Guardian to disclose the information contained in the Whitfield letter to AMICO, Guardian asserts that such conduct did not occur in California and was not directed at California. As AMICO concedes, it is an Illinois corporation, with its principal offices located in Illinois, and presumably **[*21]** would have suffered any harm resulting from the alleged nondisclosures in Illinois.

Although AMICO alleges that CMC orchestrated a fraud scheme from its offices in California, Guardian points out that AMICO does not allege participation by Guardian in CMC's fraudulent operations. Rather, Guardian argues, AMICO has alleged no more than nondisclosure, which would necessarily have occurred in Ohio. Since AMICO has alleged no conduct by Guardian in (or directed toward) California related to its allegations of fraudulent nondisclosure, Guardian asserts, a California district court would lack personal jurisdiction over the Guardian Entities and Tanner with regard to AMICO's fraud claim.

Even if the Court were to find that the Guardian Entities and Tanner were amenable to personal jurisdiction in California, Guardian argues that AMICO cannot satisfy its burden to establish that transfer is appropriate. Guardian relies on case law holding that a defendant must show that the relevant factors weigh "strongly in favor of transfer." *Bacik, 888 F. Supp. at 1414*. Guardian contends that the balance of the relevant private and public interest factors in this case weighs in favor of venue in Ohio, not **[*22]** California.

Guardian contends that, although some aspects of the CMC lease bond transactions were centered in California, substantial elements of those transactions also occurred in Ohio. Each of the transaction closings occurred in Cleveland, and Mark Fisher physically traveled from California to attend each of those closings in person. At closing, Mark Fisher paid Blaine Tanner the commissions owed to the Guardian Entities on the lease bond transactions. In this context, Guardian argues, the balance of relevant factors does not weigh in favor of a California venue, and accordingly, venue transfer is inappropriate.

Guardian notes, further, that that the Guardian Entities and Tanner currently are parties to ten separate cases pending in the Northern District of Ohio, [5] all of which arise out of the same facts and circumstances, and involve assertions of fraud by various Sureties. Guardian asserts that being required to litigate this case in San Diego, separate from the nine matters that it must litigate here in Ohio, poses a severe financial hardship to Guardian and engenders unnecessary duplication of litigation.

Guardian points out that AMICO has not claimed any inconvenience attributable to an Ohio forum, apart from the fact that it has a separate case pending against Michael Anthony and A&M in the Southern District of California. Since AMICO is actually located in Illinois, Guardian maintains, it should be no more difficult for AMICO to litigate in Ohio than in California. On the other hand, Guardian argues, the Guardian Entities maintain their principal places of business in Ohio, and Tanner maintains his residence in this state.

---

[5] Case Nos. 02-16012, 02-16017, 02-16018, 02-16019, 02-16022, 03-16002, **[*23]** 03-16003, 03-16004, 03-16005, and 03-16006.

In light of (1) the Ohio residence of the Guardian Entities and Tanner; (2) the fact that a substantial portion of the events from which AMICO's claim arises occurred in Ohio; and (3) AMICO's burden, as movant, to demonstrate that California is a more convenient forum than Ohio, Guardian argues that venue transfer is not warranted. Rather, Guardian asserts, in the circumstances presented here, a transfer of venue to the Southern District of California would "merely transfer the inconvenience of the chosen venue from [AMICO] to [Guardian]." *ALCOA, 875 F. Supp. at 433*. [6]

While AMICO relies on the maintenance of documents in California, and claims a resulting ease of access to documents in that state, Guardian maintains that the location of documents is no more than a minor consideration in the venue analysis. Guardian relies on *Invacare Corp. v. Sunrise Med. Holdings, Inc., 2004 U.S. Dist. LEXIS 28169, *14-15 (N.D. Ohio Dec. 15, 2004)*, in which this Court held:

> While defendants stress the location of documentary evidence in California, courts have viewed the 'location of documentary evidence [as] a minor consideration' because it 'may easily be sent by mail, copied or even faxed to a remote location.' (internal citation omitted). Therefore, the Court gives this factor minor consideration but finds that it does not weigh heavily in favor of transfer in light of the fact that plaintiffs' documents are in fact located in Ohio.

*Invacare, 2004 U.S. Dist. LEXIS 28169, at *14-15*. Guardian argues that, particularly in **[*25]** this case, where all parties have been afforded the opportunity to engage in extensive discovery, and all relevant documents have been copied, scanned and made available in electronic format, this factor cannot weigh strongly in favor of venue transfer.

Guardian also challenges AMICO's assertion that the majority of witnesses relevant to its fraud claims against Guardian reside in California. Guardian points out, first, that AMICO has made no showing that these nonparty witnesses are unwilling to appear in Ohio. In this regard, Guardian relies on *Duha v. Agrium, Inc., 448 F.3d 867, 877 (6th Cir. 2006)*(little weight given to the factor of availability of compulsory process where the movant fails to show unwillingness to testify).

Guardian further asserts that very few of the witnesses material to AMICO's fraud claim actually reside in California. Guardian states that it intends to proffer testimony from Blaine Tanner, Neil Gurney, and Thomas Holmes, as well as certain employees of Huntington Bank and attorneys for Huntington Bank. Guardian notes that all of these individuals, who were involved in the negotiation and drafting of the relevant transaction documents, will testify that the **[*26]** information received by Guardian would not have given Guardian notice of any fraud associated with the transactions. Presumably, all of these individuals would be amenable to compulsory process in Ohio.

Guardian further observes that Michael Anthony (also proffered as a key witness for Guardian) now resides in Florida, not California, and thus that Ohio is as convenient to him as California. [7] In addition, to the extent that AMICO seeks testimony from CMC principals Ron Fisher, Mark Fisher, and Sterling Wayne Pirtle, Guardian points out that all of these individuals are currently incarcerated, and none is located in the Southern District of California. [8]

Guardian asserts that many of the California witnesses **[*27]** listed by AMICO actually have no knowledge relevant to the elements of AMICO's claim for fraud against Guardian. Guardian notes that, of the thirteen witnesses listed in AMICO's Memorandum of Law, four of them are not discussed at all in the Declaration of AMICO's counsel. Of the eleven witnesses discussed in counsel's Declaration, two are employees or former employees of AMICO, and one is AMICO's retained expert. The convenience of party witnesses, Guardian argues, should not weigh into the venue transfer analysis. Two other witnesses, Mark and Ron Fisher, are currently incarcerated as noted above.

The six non-party witnesses described by AMICO's

---

[6] Guardian further asserts that the facts underlying **[*24]** its affirmative defenses of estoppel and unclean hands involve conduct by AMICO directed at the Guardian Entities and Tanner in their home state of Ohio. Given the Court's conclusions herein, the Court need not address this alternative argument.

[7] Brian McMichael, another witness listed by AMICO, is also described in AMICO's counsel's Declaration as a resident of Florida.

[8] Based upon the exhibit attached to the Declaration of Aparesh Paul, Esq., it appears that Sterling Wayne Pirtle is located at the Federal Medical Center in Rochester, Minnesota; Ronald Fisher is housed in the Federal Correctional Institution in Butner, North Carolina; and Mark Fisher is incarcerated in the Administrative Maximum Facility in Florence, Colorado.

counsel as residing in California include Dean Ambrosini, Keith Caneva, Bill Hanson, Eric McMichael, Scott Morgan and William Shupper. The first four of these witnesses are former employees of CMC, and based upon the description provided by AMICO's counsel, will testify as to the operations of CMC and, possibly, as to fraudulent conduct by CMC. AMICO states that Scott Morgan (business partner of Michael Anthony) will testify as to the establishment of the CMC lease bond program. AMICO provides no information about the nature of the testimony **[*28]** it anticipates from Mr. Shupper.

Guardian claims that the proposed testimony described by AMICO does not relate to the nature of this action or to the material allegations of AMICO's claim. Guardian asserts that neither the witnesses affiliated with CMC, nor those affiliated with AMICO, can testify as to (1) Guardian's knowledge of any fraudulent activities in the CMC lease bond program; or (2) any failure by Guardian to disclose any such knowledge to AMICO. Since AMICO does not allege that Guardian made any specific false statement to it, Guardian argues, AMICO's witnesses also cannot testify as to any justifiable reliance on such a statement.

Finally, Guardian argues, public interest factors also do not favor transfer of this case to California, since AMICO's claim against Guardian involves alleged fraud committed by Ohio residents against an Illinois resident. California courts, according to Guardian, have little local interest in protecting an Illinois corporation from such harm. Moreover, Guardian contends, since the elements of fraud are identical in California and Ohio, a decision as to the law applicable to AMICO's claim also should have no bearing on the question of venue.

C. [*29] Analysis

The Court has considered the entirety of the arguments submitted by both parties. AMICO has not submitted reply papers on this motion, and thus has not responded to Guardian's arguments regarding personal jurisdiction. In this context, the Court reasonably could find that AMICO has conceded Guardian's arguments relating to lack of personal jurisdiction in California. Here, however, the Court need not determine the issue of personal jurisdiction, since the Court finds, in any event, that the Northern District of Ohio is an appropriate venue for trial in this action. AMICO's motion for transfer is denied.

As set forth previously in this Opinion, a Court considering a motion for venue transfer should consider both the private interests of the parties and public interest concerns. *See* *Moses, 929 F.2d at 1137*. Relevant private interest factors to be considered include (1) the place of events involved; (2) the residences of parties; (3) the relative ease of access to sources of proof; (4) the availability of compulsory process for attendance of unwilling witnesses; (5) the nature and materiality of testimony to be elicited from witnesses who must be transported; and (6) the cost of **[*30]** obtaining attendance of unwilling witnesses. *See* *Sirak, 2008 U.S. Dist. LEXIS 94328, at *4*; *Rustal Trading, 17 Fed. Appx. 331, 2001 U.S. App. LEXIS 19062, at *10*. Relevant public interest factors include (1) the administrative burden of proceeding in courts with congested dockets; (2) the burden of imposing jury duty on people of a community having no connection with the litigation; (3) the desirability of holding a trial nearest to those affected most by it; and (4) the appropriateness of holding a trial in a diversity case in a court most familiar with the governing law. *See* *Sirak, 2008 U.S. Dist. LEXIS 94328, at *10-11*. In this case, the Court finds that the bulk of these factors either have neutral impact or weigh in favor of retaining this case in the Northern District of Ohio.

1. Place of Events Involved

With respect to the private interest factors, AMICO relies heavily on the place of the events involved, alleging that the majority of relevant events occurred in California. Guardian, on the other hand, asserts that only CMC engaged in conduct in California, while the alleged fraudulent nondisclosure by Guardian occurred in Ohio.

Neither of the parties, however, is entirely accurate in its characterization **[*31]** of the conduct relevant to AMICO's fraud claims. As Guardian points out, AMICO construes the relevant conduct too broadly, and includes conduct by CMC and AMICO in underwriting and issuing the CMC lease bonds. It is plain that the conduct of CMC and AMICO in these areas, as well as activity constituting alleged fraud by CMC in California, are not directly relevant to AMICO's fraud claim against Guardian, which is the only claim remaining for trial in this case.

Guardian, however, construes the relevant conduct too narrowly, when it asserts that any alleged fraud by Guardian must necessarily have occurred in Ohio. It is undisputed that Blaine Tanner traveled to California on several occasions to investigate the CMC lease bond opportunity, and also spent time in California socializing with Michael Anthony. If AMICO could provide any

evidence (and the Court does not speculate as to the likelihood of such evidence) that any of these contacts with California gave Tanner knowledge of any fraudulent conduct by CMC, then Tanner undoubtedly would have engaged in conduct in California relevant to AMICO's claims. In addition, the Whitfield letter, which is the center of AMICO's nondisclosure claims **[*32]** against Guardian, was sent to Guardian from California, and was forwarded by Tanner to Michael Anthony in California via fax.

Guardian also is correct, however, that some of the relevant events, including Guardian's receipt of the Whitfield letter and the closing of the transactions, occurred in Ohio. Presumably, AMICO's claim of fraudulent nondisclosure stems in part from Guardian's failure, at or before closing of the transaction, to disclose to AMICO information that Guardian allegedly knew. Guardian learned the information in question via receipt of the Whitfield letter at its offices in Ohio, and any failure by Guardian to disclose that information at closing also would have occurred in Ohio. It is apparent that Ohio has at least some relationship to AMICO's claims, since portions of the relevant events occurred in Ohio as well as California.

The Court finds, accordingly, that this factor either is neutral or weighs slightly in favor of an Ohio forum.

2. Residences of the Parties

Undisputedly, AMICO is an Illinois corporation with its principal offices in Illinois, and the Guardian Entities maintain their principal offices in Ohio. Tanner asserts that he resides in Ohio as well; AMICO **[*33]** disputes this claim, and contends that Tanner is a resident of Arizona. In any event, the parties do not dispute that none of them reside in California. Accordingly, this factor weighs in favor of retaining this action in an Ohio forum.

3. Relative Ease of Access to Sources of Proof

In connection with this factor, the Court examines the convenience of access to documentary and other evidence relevant to AMICO's fraud claims. AMICO asserts that this factor weighs in favor of a California forum, since (1) the transaction documents were executed in California and stored there; and (2) A&M also maintained its documents at its offices in California. As noted by Guardian, however, ease of access to documentary proof is given only minor consideration in light of modern discovery methods and technology now available for transmission of documents. *See* *Invacare Corp., 2004 U.S. Dist. LEXIS 28169, at *14-15*.

It would be particularly inappropriate to give undue weight to the California location of documents in this action, given that (1) the parties conducted extensive discovery, exchanging documents and other evidence over a period of approximately four years; and (2) this Court ordered the establishment **[*34]** of two document depositories in Ohio over eight years ago, in connection with the consolidated multidistrict litigation proceedings. *See* Document Depository Order issued April 29, 2003, 02-16000, Doc. 190. Pursuant to that Order, documents relevant to all of these cases have been maintained in this district for many years, and presumably remain easily accessible here. In any event, it is doubtful that the transaction documents—including the leases, lease bonds and SSAs—are material to AMICO's claims of fraudulent nondisclosure against Guardian.

Accordingly, the Court finds that this factor is neutral and weighs in favor of neither a California nor an Ohio forum.

4. Availability and Cost of Obtaining Witness Testimony

The Court examines together the factors relating to the testimony of essential witnesses in this matter, including (1) the availability of compulsory process to compel the testimony of unwilling witnesses; (2) the nature and materiality of witness testimony; and (3) the cost of transporting witnesses. On the whole, the Court finds that the balance of these factors also does not weigh in favor of transfer to the Southern District of California.

Undisputedly, AMICO has designated **[*35]** several witnesses located in California as having testimony relevant to AMICO's claims in this matter. Among these witnesses are certain former personnel of CMC, as well as AMICO's California underwriter and its expert. AMICO has failed to demonstrate, however, that the California witnesses are unwilling to testify in Ohio, or that these witnesses have material testimony in connection with AMICO's fraud claim.

As Guardian points out, the Sixth Circuit has held that little significance should be attached to the compulsory process factor where a movant fails to show unwillingness of the relevant witnesses to testify. *See* *Duha, 448 F.3d at 877*. Here, AMICO has entirely ignored the issue of willingness, and has failed even to allege that any of its proffered witnesses would refuse to testify in Ohio. It is plain that AMICO's party witnesses—

including employee witnesses and AMICO's expert—could be produced to testify in any jurisdiction. As to the other California witnesses, primarily former CMC employees, there is no showing, or even any allegation, of unwillingness to testify in Ohio.

Moreover, AMICO has provided little detail about the testimony expected from each of its California witnesses, **[*36]** and has not explained how any of these witnesses has knowledge specifically relevant to the fraud claims against Guardian. In fact, as Guardian notes, the section of AMICO's counsel's Declaration describing the anticipated testimony of AMICO's California witnesses does not mention Tanner's name, or the name of any Guardian Entity. *See* Gascou Declaration, 02-16017, Doc. 74-1, at 5-8.

Given the nature of AMICO's claims against Guardian, it appears unlikely that all of AMICO's listed California witnesses, or even the majority of them, could have knowledge directly relevant to the elements of AMICO's fraud claim. Most of the listed witnesses are former CMC employees, who likely will testify only as to (1) CMC's operations; and (2) fraudulent conduct by CMC. Although it is not impossible that some of these employees could testify that they conveyed information regarding the fraud to Guardian, AMICO has not claimed that it anticipates any such testimony. While, again, AMICO's description of each witness's expected testimony is vague, it appears that many of the California witnesses would provide testimony only tangentially relevant to AMICO's claims against Guardian.

Even assuming that AMICO's **[*37]** California witnesses have knowledge relevant to the claims at issue, numerous other witnesses not residing in California also are likely to be proffered on behalf of both parties. Certain of these witnesses are located in Ohio. Guardian states that it intends to proffer the testimony of Blaine Tanner, as well as the testimony of Guardian's attorneys, Neil Gurney and Thomas Holmes, and the testimony of certain Huntington representatives. All of these witnesses would be available to testify at trial in Ohio.

The parties apparently agree that Michael Anthony, likely to be a key witness for both parties, now resides in Florida. Thus, an Ohio venue would presumably pose no greater inconvenience to Mr. Anthony than would California. Further, to the extent that either party seeks to introduce live testimony from CMC principals Ron Fisher, Mark Fisher and/or Wayne Pirtle, it appears that obtaining such testimony would be extremely inconvenient regardless of venue, since all three of these individuals are incarcerated, and are located in states other than Ohio or California.

It is clear that, regardless of the Court's decision on AMICO's motion to transfer venue, both parties will incur some **[*38]** cost to transport relevant witnesses for trial. AMICO has not demonstrated, however, that it is substantially more burdensome for AMICO to transport its California witnesses to Ohio than for Guardian to transport its Ohio witnesses to California. In addition, while the Court is cognizant of AMICO's related case against Anthony and A&M, which remains pending in the Southern District of California, the Court also recognizes that Tanner and the Guardian Entities are party to nine related actions, all of which are pending here in the Northern District of Ohio. In such a context, the most likely result of a venue transfer would be merely to "transfer the inconvenience from one party to the other." *ALCOA, 875 F. Supp. at 433*.

Under these circumstances, it is impossible for the Court to find that AMICO has met its burden of showing that California is a more convenient venue than Ohio from the standpoint of obtaining relevant witness testimony. The Court finds that this factor is neutral, and does not favor either a California or Ohio forum.

5. Public Interest Factors

Neither party has devoted substantial attention to examining the public interest factors relevant to AMICO's venue transfer motion **[*39]** in this case. AMICO has asserted that California has a more significant interest in this case, since (1) the bonds were issued to CMC, a California obligee; and (2) this Court has determined that the transaction documents are governed by California law. Guardian, on the other hand, asserts that California has no local interest in this litigation, because (1) there are no California parties involved in this litigation; and (2) there is no relevant difference between Ohio and California law with regard to the elements of fraud.

The Court agrees with Guardian that the public interest factors in this case weigh in favor of retaining the case for trial in the Northern District of Ohio. Initially, neither party has addressed the first two public interest factors, which relate to (1) the burden imposed on courts due to their congested dockets; and (2) the burden imposed on the public by jury duty in an action with no connection to the local community. In the Court's view, these factors

lend no support to AMICO's motion to transfer. While no evidence has been introduced on this motion relating to the congestion of dockets in the Southern District of California, there is no indication that those **[*40]** dockets are less congested than those of the judges located here in the Northern District of Ohio. Moreover, given that the Guardian Entities maintain their offices in this district, and Tanner claims residence in this district, the Court is unable to find that this action has "no connection" to this district, or that imposing jury service on residents of this district would unduly burden the local community.

Further, as regards the balancing of local interests, Guardian is correct in noting that this case involves no California parties. California can have no local interest in protecting an Illinois corporation from fraud allegedly committed by Ohio residents. The fact that the lease bonds were drafted and issued in California does not bear on this analysis, since AMICO's fraud claims are not premised upon interpretation of the lease bonds.

The Court also rejects AMICO's assertion that transfer is appropriate based upon the Court's prior finding that certain transaction documents are governed by California law. As this Court has noted on multiple occasions throughout the consolidated multidistrict litigation, the Court's choice of law finding was limited to claims asserted by the parties **[*41]** premised upon the transaction documents, and did not encompass tort claims such as fraud. *See, e.g.*, Memorandum of Opinion and Order dated October 3, 2006 (02-16000, Doc. 1865), at 64, n. 32. Throughout this litigation, in evaluating claims not premised upon contract, the Court has not restricted its analysis to the law of California. In fact, in considering summary judgment motions filed by several Sureties relating to the Banks' tort claims, the Court applied the law of various states, including Ohio and Georgia. *See* Memorandum of Opinion and Order dated March 11, 2009 (02-16000, Doc. 2214). In any event, AMICO does not claim that there is any material difference between California and Ohio law as they relate to the elements of AMICO's claim for fraudulent nondisclosure.

Thus, to the extent AMICO suggests that transfer to a California court is appropriate based on a California court's greater familiarity with the local law, the Court rejects any such assertion. As noted, even if California law applies to AMICO's claims, there appears to be no relevant difference between California and Ohio law regarding the elements of fraud. Moreover, this Court has presided over these consolidated **[*42]** actions for more than eight years, and has unparalleled familiarity with the enormously complex factual background, as well as the legal issues involved in these cases. Given this Court's extensive experience with this litigation, this Court is eminently familiar with the relevant legal principles, and the Court's "institutional knowledge" renders it uniquely qualified to preside over a trial in this matter. Additionally, since this Court will preside over trials in nine cases involving similar legal issues, retaining the action in this jurisdiction furthers the interests of judicial economy.

Accordingly, the Court finds that the relevant public interest factors weigh in favor of an Ohio venue in this action.

6. AMICO's Failure to Show that California is More Convenient

As explained above, the Court has determined that each of the private and public interest factors relevant to the venue transfer inquiry either has neutral impact, or weighs in favor of retaining this action in the Northern District of Ohio for trial. AMICO, as the movant, bears the burden of demonstrating, "by a preponderance of the evidence[,] that the forum to which it desires to transfer the litigation is the more **[*43]** convenient one vis a vis the plaintiffs' initial choice." *ALCOA, 875 F. Supp. at 433* (internal quotations omitted). AMICO has failed to satisfy that burden here.

AMICO has argued that California is the most appropriate venue for this action since, in AMICO's view, the majority of events relevant to AMICO's claims occurred in California. Guardian disagrees, and asserts that all material conduct occurred in Ohio. Which party is correct is, in fact, irrelevant here, since the Court need not determine the "best" venue, and need only determine whether the venue selected by the plaintiff has a substantial connection to the claims at issue. *See, e.g., First of Michigan Corp, 141 F.3d at 263*; *Setco Enterprises Corp., 19 F.3d at 1281*. Given that a significant portion of the relevant events occurred in Ohio, Ohio undoubtedly has a substantial connection to AMICO's fraud claims against Guardian. Under such circumstances, the Court's venue inquiry is at an end, and AMICO's venue transfer motion must be denied.

IV. Conclusion

For the reasons set forth herein, AMICO's motion to transfer venue to the Southern District of California (02-16017, Doc. 74) is denied.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley

KATHLEEN [*44] McDONALD O'MALLEY

UNITED STATES DISTRICT JUDGE

Dated: June 17, 2011

End of Document

Int'l Union v. NLRB

United States Court of Appeals for the Sixth Circuit

September 28, 2016, Argued; December 21, 2016, Decided; December 21, 2016, Filed

File Name: 16a0298p.06

Nos. 15-2305/2478

Reporter
844 F.3d 590 *; 2016 U.S. App. LEXIS 22913 **; 2016 FED App. 0298P (6th Cir.) ***; 208 L.R.R.M. 3075; 167 Lab. Cas. (CCH) P10,975

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Petitioner (15-2305), INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1700, Petitioner/Cross-Respondent (15-2305/2478), v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner (15-2305/2478).

Prior History: **[**1]** On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board. Nos. 07-CA-081195; 07-CB-082391.

Caravan Knight Facilities Mgmt., 2015 NLRB LEXIS 665 (Aug. 27, 2015)

Counsel: ARGUED: John R. Canzano, MCKNIGHT, CANZANO, SMITH, RADTKE & BRAULT, P.C., Royal Oak, Michigan, for Petitioner/Cross-Respondent UAW Local 1700.

Jared D. Cantor, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent/Cross-Petitioner.

ON BRIEF: John R. Canzano, MCKNIGHT, CANZANO, SMITH, RADTKE & BRAULT, P.C., Royal Oak, Michigan, for Petitioner/Cross-Respondent UAW Local 1700.

Jared D. Cantor, Usha Dheenan, Linda Dreeben, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent/Cross-Petitioner.

GIBBONS, J., delivered the opinion of the court in which GILMAN and STRANCH, JJ., joined. STRANCH, J. (pg. 19), delivered a separate concurring opinion.

Judges: Before: GILMAN, GIBBONS, and STRANCH; Circuit Judges.

Opinion by: JULIA SMITH GIBBONS

Opinion

[*594] **[***2]** JULIA SMITH GIBBONS, Circuit Judge. United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1700 (Local 1700) was charged with violating its duty of fair representation in processing the grievance of Aretha Powell, a Local 1700 member, who was terminated from her position as an automotive **[**2]** plant janitor after threatening a fellow employee. The charge stemmed from the allegations that Margaret Faircloth, Powell's union steward, had submitted a false statement against Powell and was subsequently involved in Powell's grievance process. After an Administrative Law Judge dismissed the charge, the National Labor Relations Board (the Board) reversed, finding that Local 1700 had violated its duty of fair representation to Powell by acting arbitrarily or in bad faith. The Board emphasized that it was relying on three facts, taken together, to support its finding: (1) Faircloth had submitted a statement against Powell that was partly false; (2) Faircloth had represented Powell in the first stage of the grievance process without disclosing the fact that she had submitted a statement; and (3) Powell was unaware of Faircloth's statement throughout the grievance process. Because we conclude that the Board's finding regarding

the falsity of Faircloth's statement is not supported by substantial evidence, and that there is an insufficient basis to find that Local 1700 breached its duty of fair representation, we grant the petition for review, deny the cross-application for enforcement, **[**3]** and vacate the portion of the Board's decision addressing the breach of the duty of fair representation.

I.

A.

Caravan Knight Facilities Management, LLC (Caravan Knight) performs janitorial services for Chrysler Automotive at its Sterling Heights Assembly Plant (the Plant). International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the International Union), through its Local 1700 affiliate (Local 1700, collectively, the Union) represents Caravan Knight janitors who work at the Plant. Caravan Knight and the **[***3]** Union were parties to a collective bargaining agreement (CBA) that ran from December 1, 2009 to November 30, 2012.

Aretha Powell, the charging party, was hired by Caravan Knight as a janitor on September 2, 2008. At the same time, she joined the bargaining unit represented by Local 1700. Powell's employment at Caravan Knight was not without incident. In early May 2012,[1] Powell told a group of employees that she wanted to fight Faircloth and then offered to pay one hundred dollars to anyone else who would also fight Faircloth. Powell later apologized to Faircloth when she found out that Faircloth had learned of her statements. On May 10, Powell was **[**4]** issued a disciplinary warning for walking away from a mandatory pre-shift meeting and not being able to answer questions about what was discussed. Later in the day on May 10, Powell got into a fight at the Plant with Dishan Longmire, **[*595]** her ex-boyfriend and a fellow Caravan Knight employee. The fight was likely related to Longmire's involvement with a third employee, Balinda Tanner.

The next day, prior to the start of her shift, Powell threatened Tanner while they were in the cage area. Powell told Tanner, "I see I'mma have to tear into your motherfucking ass."[2] Tanner Hr'g Tr., JA 938. Tanner immediately reported the comments to Faircloth and LeVaughn Davis, Local 1700's union chairperson for the Plant. Tanner and Faircloth then submitted statements to Shaun Walle, Caravan Knight's site manager, indicating they were present when the threat occurred.[3] Faircloth later testified that she reported the May 10 incident with Tanner because she believed Powell's behavior was escalating. Walle proceeded to investigate the allegations by interviewing several employees, among them, Nathaniel Hudson, a janitor working on the day of the incident. On May 12, Powell met with Walle, Faircloth, and Davis **[**5]** to submit her statement about the incident with Tanner. During that meeting, Walle suspended Powell pending an investigation. Caravan Knight terminated Powell four days later on May 16.

[*4]** As an elected union steward for Local 1700, Faircloth's duties included processing grievances for terminated employees. Under the CBA, grievances were processed in a series of steps. First, the employee or a representative submitted a written grievance to her immediate supervisor that was signed by a union committee person (Step 1). If the grievance was not resolved at Step 1, Caravan Knight and Local 1700 representatives would meet to attempt to resolve the dispute (Step 2). If the grievance could not be resolved in this meeting, representatives from Caravan Knight, the International Union, and Local 1700 would meet to attempt to resolve the grievance (Step 3). If this was unsuccessful, either party could take the matter to binding arbitration (Step 4).

On May 18, Faircloth submitted a grievance on Powell's behalf to satisfy Step 1. She met with Walle to submit the grievance but did not offer any arguments on Powell's behalf.[4] Caravan Knight denied the grievance at Step 1. Local 1700 then proceeded to **[**6]** Step 2 of the grievance procedure, with Davis now representing the Union and Powell. Davis and Caravan Knight negotiated a settlement that would allow Powell to return to work without back pay. In exchange, Powell would be required to complete an anger-management course, drop all pending claims before the Board, and sign a ninety-day last-chance agreement. These terms were consistent with a recent settlement agreement in a

[1] All subsequent dates refer to 2012 unless otherwise indicated.

[2] The ALJ credited Tanner's testimony over Powell's with respect to this incident.

[3] The ALJ found Faircloth was not in the room at the time, relying on the "credible testimony" of Nathaniel Hudson, a fellow Caravan Knight employee. JA 966. The Board also found that Faircloth did not witness Powell's statement to Tanner.

[4] Both the ALJ and the Board found that Faircloth's actions constituted "representing Powell at Step 1" of the grievance process. JA 967, 1155.

grievance based on similar facts. Davis testified that a settlement was proposed within 48 hours of the grievance moving to Step 2.

Davis informed Powell of the proposed settlement on May 23. Powell rejected it.[5] The Union and Caravan Knight, nevertheless settled the grievance under the agreed-upon terms. Powell received a letter **[*596]** confirming the disposition of her grievance on July 26.

Between May 16 and August 14, Powell filed a series of charges against Caravan Knight, the International Union, and Local 1700, alleging violations of *Sections 8(a)(1)*, *(a)(3)*, *(b)(1)(A)*, and *(b)(2)* of the National Labor Relations Act (NLRA). After charges were filed, Caravan Knight interviewed employees, asking about their interactions with Board investigators. Powell **[***5]** testified that she did not learn of Faircloth's statement **[**7]** about the May 11 incident until the Board informed her of it in early June.

B.

On August 21, the Board's Regional Director consolidated Powell's charges and issued a single complaint against all three parties. This consolidated complaint alleged that Caravan Knight violated *Sections 8(a)(1)* and *(a)(3)* of the National Labor Relations Act (NLRA) by imposing onerous working conditions on Powell, changing her job duties, disciplining her, suspending her, and discharging her because she engaged in protected activity. The complaint also alleged that Caravan Knight violated *Section 8(a)(1) of the NLRA* by coercively interrogating employees about their communications with a Board investigator. The complaint alleged that the Union's refusal to proceed to arbitration on Powell's grievance was arbitrary, discriminatory, or bad-faith conduct constituting a breach of the union's duty of fair representation to Powell, in violation of *Section 8(b)(1)(A) of the NLRA*. The complaint further alleged that Local 1700 caused Caravan Knight to discriminate against and discharge Powell because of her protected activity, in violation of *Section 8(b)(2)*.

An Administrative Law Judge (ALJ) held a hearing on these allegations. On April 3, 2013, the ALJ issued a Decision and Order dismissing the complaint in its **[**8]** entirety. With respect to Caravan Knight, the ALJ found an insufficient causal connection between Powell's protected activity and the disciplinary action. The ALJ also found that a totality of the circumstances established that Caravan Knight's subsequent interviews with employees were not unlawfully coercive. The ALJ dismissed all charges against the International Union because the legal distinction between the International Union and Local 1700 precluded any derivative duties on the International Union and there was no indication that International Union officials were involved in Powell's grievance process.

In considering the claims against Local 1700, the ALJ found it undisputed that there was a strained relationship between Powell and the three local union officials—Davis, Faircloth, and Tanner—all of whom were involved in her grievance process. The ALJ, however, recognized that these Local 1700 officials still filed a grievance on Powell's behalf and negotiated a **[***6]** settlement for Powell's reinstatement consistent with a recent settlement for another employee in a similar situation. The ALJ found that the Board's Acting General Counsel failed to show that Tanner and Faircloth acted **[**9]** as union agents when submitting witness statements against Powell. For these reasons, the ALJ concluded that there was no arbitrary or bad faith conduct on the part of Local 1700, and thus no violation of its duty of fair representation under *Section 8(b)(1)(A)*. As to the *Section 8(b)(2)* charge that Local 1700 caused Caravan Knight to discharge Powell, the ALJ found no evidence that Tanner and Faircloth did anything other than perform their required duties as Caravan Knight employees by submitting the statements that led to Powell's discipline and termination.

[*597] The Board's Acting General Counsel filed thirteen exceptions to the ALJ's decision on May 31, 2013.[6] Caravan Knight filed two cross-exceptions on June 14, 2013. A three-member panel of the Board issued a Decision and Order on August 27, 2015, affirming in part and reversing in part the ALJ's decision. The Board adopted all of the ALJ's witness-credibility determinations, finding no "clear preponderance" of evidence on which to reverse such findings. JA 1151 n.2. The Board reversed the ALJ on two issues. First, it found that Caravan Knight violated *Section 8(a)(1)* by coercively interrogating an employee about her

[5] The ALJ found that Powell would have rejected the settlement regardless of its terms. The Board found that she may have taken a different course.

[6] The Acting General Counsel did not take exception to the dismissal of the International Union, so it was never considered by the Board and is not at issue in this appeal.

statements to a Board agent.[7] Second, the Board found Local 1700 **[**10]** liable under Section 8(b)(1)(A) for violating its duty of fair representation to Powell. Although the Board determined that Local 1700 acted within its discretion to refuse to pursue Powell's grievance past Step 2, it held that Local 1700 breached its duty of fair representation to Powell on the basis of three facts "consider[ed] cumulatively" that established bad faith or arbitrary conduct:

> (i) Union Steward Faircloth submitted a statement against Powell that was, in part, false; (ii) Faircloth represented Powell in step 1 of the grievance procedure without disclosing that she had submitted a statement against Powell; and (iii) throughout the processing of her discharge grievance, Powell remained unaware that Faircloth had submitted a statement regarding the matters at issue in Powell's grievance.

[*7]** JA 1151, 1155. The Board reasoned that Powell might have pursued a different course of action had she known of Faircloth's statement. The Board was careful to note that this case presented "unique circumstances" because of the "absence of any disclosure to Powell" and that its liability finding was "narrowly circumscribe[d]." JA 1156.

The Union petitioned this court for review of the Board's decision and order as to a single issue: whether **[**11]** Local 1700 was liable under Section 8(b)(1)(A) for breaching its duty of fair representation. The Board filed a cross-application for enforcement of its decision and order against Local 1700.

II.

We review the Board's factual determinations and its applications of law to fact under the substantial-evidence standard. NLRB v. Galicks, Inc., 671 F.3d 602, 607 (6th Cir. 2012). We uphold the Board's decisions if there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Int'l Union, United Auto., Aerospace & Agric. Workers of Am. v. NLRB, 514 F.3d 574, 581 (6th Cir. 2008) (internal citations omitted). The Board's determinations of law are reviewed *de novo.* Id. at 580.

In reviewing the Board's fact-finding, we "respect the judgment of the agency empowered to apply the law to 'varying fact patterns.'" Holly Farms Corp. v. NLRB, 517 U.S. 392, 399, 116 S. Ct. 1396, 134 L. Ed. 2d 593 (1996) (quoting Bayside Enters., Inc. v. NLRB, 429 U.S. 298, 304, 97 S. Ct. 576, 50 L. Ed. 2d 494 (1977)). We "defer to the Board's reasonable inferences and credibility determinations, 'even if we would conclude differently under *de novo* review.'" Galicks, 671 F.3d at 607 (quoting FiveCAP, Inc. v. ***[*598]*** NLRB, 294 F.3d 768, 776 (6th Cir. 2002)). "The Board's choice between two equally plausible and reasonable inferences from the facts cannot be overturned on appellate review, even though a contrary decision may have been reached through de novo review of the case." Exum v. NLRB, 546 F.3d 719, 724 (6th Cir. 2008).

The Board is "free to find facts and draw inferences different from those of the ALJ." Jolliff v. NLRB, 513 F.3d 600, 607 (6th Cir. 2008). But it cannot "ignore relevant evidence that detracts from **[**12]** its findings." GGNSC Springfield LLC v. NLRB, 721 F.3d 403, 407 (6th Cir. 2013). The ALJ's findings "are part of the record we must review" and therefore are considered **[***8]** "to the extent that they reduce the weight of the evidence supporting the Board's conclusion." Int'l Union, United Auto., Aerospace & Agric. Workers, 514 F.3d at 581 (citing W.F. Bolin Co. v. NLRB, 70 F.3d 863, 870 (6th Cir. 1995)).

III.

As a preliminary matter, the Board argues that two issues raised by the Union are jurisdictionally barred because they were not properly presented to the Board. The first is whether the Board's opinion imposes too great a duty to act on the Union given the established standard for the duty of fair representation (Issue 1). The second is whether the failure to disclose Faircloth's statement is immaterial because the Union cannot breach its duty of fair representation when it had no obligation to pursue an unmeritorious grievance in the first place (Issue 2).[8] The Board alleges that these issues were not "specifically assert[ed] before the Board" in the Union's Answer to the Acting General Counsel's Exceptions, or in a subsequent motion for reconsideration. CA6 R. 30, at 23. The Union objects to the Board's assertion, suggesting that it relies on a "hypertechnical and legally unsound" interpretation of the jurisdictional bar under 29 U.S.C. § 160(e), and that the Board was "adequately apprised" of the **[**13]**

[7] Caravan Knight has not challenged the Board's decision.

[8] The Union conceded that a third issue—whether the Board needed to find that the alleged breach more than likely affected the outcome of the grievance procedure in order to impose liability—is more properly litigated at the compliance stage of the Board's enforcement proceedings.

issues because they were "sufficiently presented" and "necessarily considered" by the Board. CA6 R. 34, at 15, 19. Because we can resolve the case on appeal without reaching Issue 2, we consider only whether Issue 1, the Union's challenge to the scope of the duty imposed by the Board, is jurisdictionally barred.

We lack jurisdiction to hear any "objection that has not been urged before the Board, its member, agent, or agency" unless "the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *29 U.S.C. § 160(e)*; *Temp-Masters, Inc. v. NLRB, 460 F.3d 684, 690 (6th Cir. 2006)*; *NLRB v. U.S. Postal Serv., 833 F.2d 1195, 1201-02 (6th Cir. 1987)* ("Our jurisdiction is conferred by . . . *29 U.S.C. § 160(e)*."). We have recognized, however, that "[t]he specificity required for a claim to escape the ban imposed by *[§ 160(e)]* is that which will 'apprise the Board of an intention to bring up the question.' A general objection **[***9]** combined with special circumstances may be sufficient to constitute notice." *NLRB v. Watson Rummell Elec. Co., 815 F.2d 29, 31 (6th Cir. 1987)* (internal citation omitted) (quoting *May Dep't Stores v. NLRB, 326 U.S. 376, 386 n.5, 66 S. Ct. 203, 90 L. Ed. 145 (1945))*. An objection was "urged before the board" if it was raised with sufficient specificity in briefing prior to the **[*599]** Board's decision, or in a subsequent motion for reconsideration. *See Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-66, 102 S. Ct. 2071, 72 L. Ed. 2d 398 (1982)* (finding an issue barred because it was "not raised during the proceedings before the Board" or "in a petition **[**14]** for reconsideration or rehearing"); *Temp-Masters, 460 F.3d at 690*; *U.S. Postal Serv., 833 F.2d at 1202* (recognizing that briefing on exceptions before the Board would be sufficient to preserve an issue).

The Union filed an Answering Brief in response to the Acting General Counsel's exceptions to the ALJ's decision. It does not appear that the Union filed any subsequent briefing before the Board or a motion to reconsider the Board's decision. A review of the record clearly indicates that the Union sufficiently presented arguments about the increased scope of the duty of fair representation similar to those it now raises. In its brief, the Union discussed its duty to "serve the interests of all members" and "avoid arbitrary conduct" as required by *Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967)*. JA 1117. It raised an argument that the Board should leave some discretion to the Union in pursuing grievances and that not every grievance would be handled with the "maximum skill and adeptness," nor must "a grievant's case be advocated in a perfect manner." JA 1117-18. The Union asserted that "[m]ere negligence, poor judgment or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation." JA 1118. The Union now makes an almost identical argument: "[T]he Board's theory **[**15]** in this case imposes a duty on Unions to act as professional legal ethicists, a duty incompatible with and contrary to established duty of representation law." CA6 R. 21, at 38. Because the Union's prior briefing was sufficient to apprise the Board of the issue it now raises on appeal, we find that Issue 1 was properly preserved for consideration here.

IV.

Before determining whether the Union breached its duty of fair representation to Powell, we address whether there is substantial evidence in the record to support the factual findings relied on by the Board. *See Galicks, 671 F.3d at 607*. Substantial evidence exists if a **[***10]** "reasonable mind might accept [the evidence] as adequate to support a conclusion." Int'l Union, *United Auto., Aerospace & Agric. Workers of Am., 514 F.3d at 580*.

A.

There is no question that Faircloth submitted a statement against Powell with respect to the May 11 incident in the cage area. The parties, however, dispute the Board's finding that Faircloth's statement was "partly false." *See* JA 1155. The underlying factual issue is whether Faircloth witnessed the incident between Powell and Tanner. Both the ALJ and the Board determined that Faircloth had not witnessed the incident. After reviewing both the Board's analysis and the administrative record, we conclude that **[**16]** this finding lacks substantial evidence.

Initially, the ALJ determined that "Faircloth was not present in the room at the time [of the threat]." JA 966. The Board agreed, stating:

> In her witness statement, Faircloth asserted that she had witnessed the threat. Consistent with the judge's credibility determinations, which we have adopted, that was not the case. Instead, Faircloth learned of the threat when Tanner reported it to Faircloth immediately following the incident.

JA 1153. The ALJ credited the following testimony of Nathaniel Hudson, a Caravan **[*600]** Knight employee, in making this determination:

> Q. Who is your steward?

A. Margaret [Faircloth]

Q. . . . Prior to the meeting that morning — well, the time you were there, did you see Faircloth in the area?

A. I saw her on my way out.

Q. She was entering as you were leaving?

A. Yes.

Hudson Hr'g Tr., JA 669-70. The ALJ also credited testimony from LeVaughn Davis confirming that Hudson was in fact present at the meeting:

Q. On May 11, 2012, did you attend the daily meeting?

A. Yes, I did.

Q. Do you recall who was there?

A. There was Aretha, Balinda, Ms. Jackie, Debbie, Larry, Eddie, Patrice, Dishan, Amer, myself, *Nathaniel*, Shantell, and Keenan.

[*11]** Davis **[**17]** Hr'g Tr., JA 890-91 (emphasis added). Although not mentioned by the ALJ or the Board, Hudson continued his testimony with respect to the incident and Faircloth's presence on cross-examination:

Q. . . . [I]s it fair to say that once you left the cage area, you don't know what occurred in the cage area?

A. No.

Q. Am I correct?

A. Yes, you're correct.

Q. All right. And as you were walking out the cage area, you passed Ms. Faircloth, who was entering the cage area?

A. Yes.

Q. Did you pass her like in the hallway or in the doorway?

A. Doorway. It's a big open space, you know.

Q. Okay.

A. -- that open up because sometimes we bring supplies in. She was walking in as I was walking out.

Q. All right. Was she already in the cage area?

A. She was just -

Q. At the time?

A. -- she was just at the entrance.

Hudson Hr'g Tr., JA 679-80. Hudson also testified that shortly after he left, there was a "commotion" in the cage area, and he saw Powell leave "upset about something." JA 680.

The Union argues that we need not discredit Hudson to find a lack of substantial evidence because "Hudson's testimony is not inconsistent with Faircloth's presence in the area where the threat occurred." CA6 R. 21, at 20. We agree. Hudson's **[**18]** testimony supports two inferences: first, that Hudson was not present for Powell's threat because he had left the cage area just before it occurred, and second, that Faircloth had entered the cage area just prior to a commotion that left Powell upset, activity that could have been Powell's exchange with Tanner. There is nothing in Hudson's testimony, however, to support the Board's inference that Faircloth was not present at the time of the threat. Furthermore, his testimony does not contradict Tanner's testimony that Faircloth was present during the May 11 incident. Tanner was credited by the ALJ in other parts of the initial decision, but ignored by the Board in considering Faircloth's presence.

Although the record before us does not conclusively establish Faircloth's presence at the time of the threat, we are not faced with a case involving "two equally plausible and reasonable **[***12]** inferences from the facts." *Exum, 546 F.3d at 724*. The Board's inference as to Faircloth not being present **[*601]** was unreasonable. Such a conclusion is not supportable in a reasonable mind. *See* Int'l Union, *United Auto., Aerospace & Agric. Workers of Am., 514 F.3d at 580*. The record further indicates that the Board ignored relevant evidence—Tanner's testimony—that detracted from its findings. *See GGNSC Springfield, 721 F.3d at 407*. The only **[**19]** reasonable inference from the record before the Board was that Faircloth was in the area shortly before the incident between Powell and Tanner occurred. This directly contradicts the Board's finding that Faircloth was not present, which was the basis for finding that her statement was partly false. As such, the Board's finding about Faircloth's statement is not supported by substantial evidence.

B.

Although the Board erred in finding that Faircloth's statement was partly false, our review of the record confirms that there is substantial evidence to find that Faircloth represented Powell in Step 1 of the grievance process. In her role as a union steward, Faircloth prepared and submitted materials that initiated the grievance process after Powell was terminated. She then met with Walle to submit the grievance. Although this was the extent of her formal involvement with Powell's grievance, we find it is sufficient to support the Board's finding that Faircloth had "represented" Powell during Step 1 of the grievance process.

The Union, for the most part, does not dispute the facts

in the record.[9] Instead, it argues that the Board "vastly overstates" Faircloth's role in the grievance process, **[**20]** something the Union describes as "ministerial." CA6 R. 21, at 29; CA 6 R. 34, at 9. The fact that there are not significant negotiations during Step 1 and that the majority of grievances are rejected at Step 1 and proceed to Step 2 does not change the fact that Faircloth submitted forms to start the grievance process on Powell's behalf. In doing so, she was representing Powell's interests and ensuring that both Powell and the Union preserved their rights under the CBA to challenge Powell's termination. Powell's testimony supports such a finding regarding Faircloth's role. Powell testified that Faircloth informed her that a grievance had been initiated and that Faircloth would manage the initial steps of the grievance because Powell was not allowed on the premises. **[***13]** Powell also testified that she continued to stay in contact with Faircloth about the status of her grievance and alternative avenues for relief. This indicates that Powell understood Faircloth to be an important part of her grievance process and challenges the Union's attempt to minimize Faircloth's role. With this record, we find substantial evidence to support the Board's finding that Faircloth represented Powell in Step **[**21]** 1 of the grievance process.

C.

The Union does not take direct issue with the Board's finding that Powell was unaware that Faircloth had submitted a statement against her throughout her grievance process. The Union concedes that Davis did not mention Faircloth by name during his May 23 call with Powell, in which he shared the company's settlement offer, and advised Powell of statements against her. The Union points out that Powell knew about the statement "at the latest on June 2, only 8 days after her last discussion with Davis about the settlement **[*602]** on May 25." CA6 R. 21, at 34. But the Union does not dispute the Board's finding that neither Faircloth, Davis, nor anyone at Local 1700 disclosed Faircloth's statement prior to the conclusion of the grievance process. Because the Union has effectively admitted that it failed to disclose Faircloth's statement, we uphold the Board's finding. *See* Galicks, Inc., 671 F.3d at 608 (citing FiveCap, Inc., 294 F.3d at 768).

To the extent that the Board's finding is disputed, there is substantial evidence that the Union failed to disclose Faircloth's statement. Powell testified that she was aware that Tanner had filed a statement against her, but it was only after filing a charge with the Board that she was informed **[**22]** that Faircloth had filed a statement about the incident. The record supports this testimony. Powell filed her first charge with the Board on May 16. Powell did not mention Faircloth's statement until she filed a second charge with the Board in early June, well after Davis settled the grievance with Caravan Knight. These undisputed facts provide substantial evidence for the Board's finding that no one disclosed Faircloth's statement to Powell, and that Powell was unaware of the Faircloth statement while her grievance was being processed.

[*14]** V.

Having evaluated the Board's factual findings, we consider whether the record provides substantial evidence to support the Board's determination that Local 1700 breached its duty of fair representation to Powell on these facts.[10] *See* Galicks, Inc., 671 F.3d at 607-08. Although we recognize our policy of deference to the Board's determinations, *see id.*, we conclude that the remaining factual basis of the Board's decision—that Faircloth and Local 1700 failed to disclose Faircloth's adverse statement to Powell while Faircloth was representing her in grievance proceedings—is insufficient to support such a finding. Because there is no basis to find that the Union violated its duty of fair **[**23]** representation on either the facts of this case or any applicable precedent, we see no reason to remand the case to the Board. Instead, we vacate the portion of the Board's decision finding that Local 1700 violated its duty of fair representation

A.

Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations" as well as the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Under Section 8(b)(1)(A), it is an unfair labor practice for a labor organization to "restrain or coerce" employees in exercising their Section 7 rights. 29 U.S.C.

[9] The Union vigorously argues that the Board mistakenly found that Faircloth held a "Step 1 meeting" on May 12. But the record clearly states that Powell met with Walle to submit the grievance on May 18.

[10] We recognize that we could consider the Board's determination of the scope of the duty of fair representation as a matter of law *de novo*. Because the Board's application of law to fact fails under the more deferential "substantial evidence" standard, we apply that here.

§ 158(b)(1)(A). Within the framework of the NLRA, the Supreme Court has found that unions have an implied duty of fair representation to their members. Driver v. U.S. Postal Serv., 328 F.3d 863, 868 (6th Cir. 2003) (citing DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983)). This duty "stands 'as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.'" DelCostello, 462 U.S. at 164 n.14 (quoting Vaca v. Sipes, 386 U.S. 171, 182, ***[*603]*** 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967)). It applies "in all contexts of union activity, including contract negotiation, administration, enforcement, and grievance processing." Merritt v. Int'l Ass'n of Machinists & Aerospace Workers, 613 F.3d 609, 619 (6th Cir. 2010) (citing Williams v. Molpus, 171 F.3d 360, 364-65 (6th Cir. 1999)).

[*15]** "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a **[**24]** member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca, 386 U.S. at 190. This standard provides "three separate and distinct possible routes by which a union may be found to have breached its duty." Driver, 328 F.3d at 869 (quoting Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 584 (6th Cir. 1994)). Because there is no allegation of discrimination here, we consider only whether Local 1700 breached its duty by acting arbitrarily or in bad faith.

B.

"A union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." Airline Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991) (internal citation and quotation marks omitted). "The 'wholly irrational' standard is described in terms of 'extreme arbitrariness.'" Garrison v. Cassens Transp. Co., 334 F.3d 528, 539 (6th Cir. 2003) (quoting Black, 15 F.3d at 585). In the context of employee grievances, we have held that the duty of fair representation requires a union to undertake a "reasonable investigation to defend a member from employer discipline." Driver, 328 F.3d at 869 (quoting Black, 15 F.3d at 585). It "does not require a union to exhaust every theoretically available procedure simply on the demand of a union member. . . . However, the ignoring or the perfunctory processing of a grievance may violate the duty of fair representation." St. Clair v. Local 515, 422 F.2d 128, 130 (6th Cir. 1969) (citing Vaca, 386 U.S. at 194). Furthermore, **[**25]** we have held that "[m]ere negligence on the part of a union" is not sufficient to show arbitrary conduct, Garrison, 334 F.3d at 538 (citing United Steelworkers of Am. v. Rawson, 495 U.S. 362, 372-73, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990)), and we note that "when reviewing a union representative's actions or omissions, we must never lose sight of the fact that union agents are not lawyers, and as a general proposition, cannot be held to the same standard as that of licensed professionals," id. at 539; *see also* Danton v. Brighton Hosp., 335 F. App'x 580 (6th Cir. 2009).

The Board did not address in detail how Local 1700's actions constituted arbitrary conduct. The decision cites no judicial or Board precedent to support such a finding. Instead, it simply asserts that Faircloth's representation of Powell without disclosing her adverse statement, **[***16]** along with the inference that such action "reasonably could have altered Powell's approach to the processing of her grievance," constituted arbitrary conduct sufficient to establish a breach of the duty of fair representation. JA 1155. After reviewing the record, we agree with the Union that there is not substantial evidence to find that Local 1700 acted arbitrarily with respect to Powell because Local 1700's actions were not "wholly irrational." Garrison, 334 F.3d at 539.

First, there was a rational basis for Local 1700 not to disclose Faircloth's statement. It **[**26]** was reasonable for Local 1700 to be concerned about how Powell would respond based on her history at Caravan Knight. Prior to the May 11 incident, Powell **[*604]** had both indicated her desire to fight Faircloth and had an altercation with an ex-boyfriend at the plant. Faircloth testified that she gave her statement regarding Powell's incident with Tanner only because she believed Powell's behavior to be escalating. The Board recognized that Faircloth's statement "would in all likelihood result in Powell's discharge," but found it acceptable for Faircloth to submit such a statement because "the union [had] a legitimate interest in reporting such threats to an employer consistent with its duty to represent all unit employees." JA 1154. Local 1700's interest in protecting the entire bargaining unit from the threats of a single union member makes it rational to not disclose Faircloth's statement in an attempt to protect her from any retaliation by Powell.

Second, there was a rational explanation for Faircloth's decision to represent Powell during Step 1 of the grievance process. Powell was unable to file a grievance herself because she was not allowed to be on

the Plant's premises. The responsibility **[**27]** thus fell to Faircloth as Powell's union steward. Although, in theory, Faircloth could have recused herself, the only evidence in the record to support such a practice was Davis's testimony that he had, on occasion, processed grievances for employees when a union steward was unable to do so. We hesitate to find that Local 1700 breached its duty of fair representation because Faircloth did not recuse herself. Such an action starts to resemble a rule similar to an attorney's conflict of interest—and our prior cases clearly state that "union agents are not lawyers" and "cannot be held to the same standard as that of licensed professionals." *Garrison, 334 F.3d at 539*.

We also note that Faircloth's representation of Powell at Step 1 did not adversely affect the outcome of the grievance proceedings. The record indicates that Step 1 usually consists of nothing more than a union steward filling out a bare-bones form to notify the employer of the **[***17]** grievance's basic allegations. This is all Faircloth did at Step 1 in this case. And at Step 2, another union official, Davis, represented Powell and negotiated a settlement on her behalf. The Board found that this settlement was reasonable and consistent with a settlement **[**28]** offered to another employee in a similar case. This leaves no factual basis on which to conclude that Faircloth's involvement at Step 1 affected the outcome of the grievance proceedings in any way.

Furthermore, the Board's own precedent allows a union member and her union representative to have an adverse relationship without the Union breaching its duty of fair representation. *Roadway Express, Inc., 355 N.L.R.B. 197, 202 (2010)*. At most, Faircloth's failure to recuse herself from Powell's grievance process at the outset was negligent. Her actions were not wholly irrational. Thus, there is not sufficient evidence to support the Board's finding that Local 1700 breached its duty of fair representation by engaging in arbitrary conduct.

C.

A union can also breach its duty of fair representation by acting in bad faith. This occurs when "it acts with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Merritt, 613 F.3d at 619* (quoting *Spellacy v. Airline Pilots Ass'n Int'l, 156 F.3d 120, 126 (2d Cir. 1998)*). In this case, there is little, if any, evidence in the record to support a finding that Local 1700 acted with improper intent. Had there been substantial evidence to support the claim that Faircloth gave a partly false statement, the Board might have been able to establish **[*605]** bad **[**29]** faith conduct. Faircloth's failure to disclose her statement during her representation of Powell, however, is an insufficient basis to find that she and Local 1700 acted in bad faith. Additionally, the record indicates that Faircloth properly handled the grievance, that the grievance was resolved by Local 1700 on terms favorable to Powell, that the settlement was "reasonable and consistent" with that of an analogous incident, and that there was no evidence that Powell would have accepted the offer at Step 2 if she had had a different representative at Step 1. This is not the type of "intentionally misleading conduct" associated with a finding of bad faith. *Merritt, 613 F.3d at 619*. We conclude that the Board lacked substantial evidence to find a breach of the duty of fair representation on the basis that Local 1700 acted in bad faith.

VI.

[*18]** For these reasons, we grant the petition for review, deny the cross-application for enforcement, and vacate the portion of the Board's decision finding that Local 1700 violated its duty of fair representation.

Concur by: STRANCH

Concur

[*19] CONCURRENCE**

STRANCH, Circuit Judge, concurring. I concur with the lead opinion that there is not sufficient evidence to support the Board's finding that Local **[**30]** 1700 breached its duty of fair representation, but write separately to emphasize the unique circumstances that merit vacating the Board's decision. In reviewing the Board's factual determinations under the substantial evidence standard, we defer to the Board's reasonable inferences and credibility determinations even when "we would conclude differently under de novo review." *Mt. Clemens Gen. Hosp. v. NLRB, 328 F.3d 837, 844 (6th Cir. 2003)* (citing *Painting Co. v. NLRB, 298 F.3d 492, 499 (6th Cir. 2002)*). This considerable deference reflects the weight given to the Board's expertise and its prerogative to choose among the conflicting testimony of witnesses. *See NLRB v. Taylor Mach. Prods., Inc., 136 F.3d 507, 514 (6th Cir. 1998)* ("[I]f the record supports the Board's decision, we may not substitute our own judgment for that of the Board.")

In the present case, the Board expressly stated that it relied on a combination of three factual findings to determine that Local 1700 violated its duty of fair representation. As explained in the lead opinion, we find that one of these conclusions—that Faircloth submitted a partially false statement—is not supported by substantial evidence in the record. Though the Board's other two factual findings remain, they are insufficient to support its ultimate conclusion. The Board's determination rested expressly on the cumulative effect of these **[**31]** three findings. Had the Board's determinations on the three factors been independent, remand to the Board for consideration in light of our reversal on one finding would have been appropriate. On this unusual record, however, I concur with vacating the portion of the Board's decision finding that Local 1700 violated its duty of fair representation.

LexisNexis

J4 Promotions, Inc. v. Splash Dogs, LLC

United States District Court for the Northern District of Ohio, Eastern Division

February 13, 2009, Decided; February 13, 2009, Filed

Case No. 08 CV 977

Reporter
2009 U.S. Dist. LEXIS 11023 *; 2009 WL 385611

J4 PROMOTIONS, INC., Plaintiff, v. SPLASH DOGS, LLC, et al., Defendants.

Subsequent History: Motion denied by *J4 Promotions, Inc. v. Splash Dogs, LLC, 2010 U.S. Dist. LEXIS 54063 (S.D. Ohio, May 3, 2010)*

Counsel: **[*1]** For J4 Promotions, Inc., Plaintiff: H. Alan Rothenbuecher, Schottenstein, Zox & Dunn - Cleveland, Cleveland, OH; T. Earl LeVere, Schottenstein, Zox & Dunn - Columbus, Columbus, OH.

For Splash Dogs, LLC, Tony Reed, Wendy Krehbiel, Randy Woods, Thanh Nguyen, Tracy Hughes, Defendants: Randy Woods, Cloverdale, IN; Thanh Nguyen, Fountain Valley, CA.

Judges: KATHLEEN McDONALD O'MALLEY, UNITED STATES DISTRICT JUDGE.

Opinion by: KATHLEEN McDONALD O'MALLEY

Opinion

MEMORANDUM & ORDER

I. INTRODUCTION

On April 16, 2008, the Plaintiff filed a six-count complaint in this Court alleging Copyright Infringement, Defamation, Deceptive Trade Practices, Tortious Interference with Business Relations, and Unfair Competition. (Doc. 1.) In response, on May 15, 2008, Defendants filed a motion to dismiss for lack of personal jurisdiction, improper venue, and, in the alternative, to transfer the case to the Central District of California pursuant to *28 U.S.C. § 1404(a)*. (Doc. 15.) On June 16, 2008, Plaintiff filed a brief in opposition to Defendants' motion. (Doc. 22.) This matter is now ripe for consideration. [1] For the reasons articulated below, Defendants' motion to dismiss is **DENIED in part and GRANTED in part**, and the case is **TRANSFERRED** **[*2]** to the United States District Court for the Southern District of Ohio.

II. BACKGROUND [2]

A. PARTIES

Plaintiff J4 Promotions, Inc., dba DockDogs ("DockDogs"), is a Wyoming corporation with its principal place of business in Medina, Ohio. Plaintiff is engaged in the business of holding and promoting dog sporting events. Plaintiff is particularly known, in this regard, for developing the organized sport of canine dock jumping. [3]

Defendant Splash Dogs, LLC ("Splash Dogs") is a California limited liability company with its principal place of business in Pittsburgh, California. Splash **[*3]** Dogs is also engaged in holding athletic events for dogs, including canine dock jumping.

Defendant Tony Reed is a California resident and is the

---

[1] The Defendants did not file a reply, and the time for doing so has now expired.

[2] The fact recited in this section are based on the Complaint and the parties' submissions. Because the Court is considering the Defendants' motion without an evidentiary hearing or the benefit of discovery, the pleadings and affidavits are construed in the light most favorable to the Plaintiff. *Preferred Capital, Inc. v. Assocs. in Urology, 453 F.3d 718, 720 (6th Cir. 2006)*.

[3] Canine dock jumping is an event where dogs jump from a specified-sized dock into a specifically designed pool of water to see which dog can jump the farthest.

founder, sole owner, and President of Defendant Splash Dogs. Defendant Reed administered and assisted two of Plaintiff's canine athletic events in November 2005 and February 2006.

Defendant Randy Woods is an Indiana resident and is currently an employee of Defendant Splash Dogs. From 2002 until May 2005, Plaintiff employed Defendant Woods as an independent contractor. During this time, Defendant Woods worked on many of Plaintiff's events and activities. In particular, Defendant Woods served as a judge at one of Plaintiff's events in Pennsylvania.

Defendant Thanh K. Nguyen [4] is a California resident and is an attorney licensed to practice law in California. Defendant Nguyen has competed as a handler in both Plaintiff's events and Defendant Splash Dogs' events. Defendant Nguyen has also represented clients in litigation against Plaintiff.

B. STATEMENT OF FACTS

Plaintiff began holding and promoting dog sporting events in 2000. **[*4]** During that year, Plaintiff began holding an event entitled "Big Air Dogs" in conjunction with ESPN's Great Outdoor Games. This event involved a then-novel competition -- canine dock jumping. In 2007, Plaintiff held over 100 canine athletic events and shows throughout North America with more than 3,000 registrants competing. Plaintiff's events have been featured on international media venues, such as ESPN, ABC, The Outdoor Channel, and CBS. Many national corporate sponsors support Plaintiff's business, including: Cabela's, Nutro Products, Inc., Dokken Dog Supply, Inc., Splash Super Pools, SportDOG Brand, Inc., Ducks Unlimited, Jordan Outdoor Enterprises, Ltd. (dba "Realtree"), Hydro Laboratories, and Bass Pro Shops, Inc.

In connection with the canine dock jumping event, Plaintiff developed and promulgated original rules and policies for its events and for its national ranking and qualifications, which it has registered with the United States Copyright Office. Plaintiff also owns federal trademark registrations or applications for the following marks -- DOCKDOGS, SPEED RETRIEVE, EXTREME VERTICAL, DOCK DIVING, and DOCK JUMPING. Plaintiff uses each of these marks to advertise and promote **[*5]** its canine athletic competitions. Plaintiff also administers an internet website at www.dockdogs.com, which Plaintiff asserts receives in excess of 45,000 hits per month. In 2007, Plaintiff published its first edition of "DockDogs Magazine." This publication is intended to promote Plaintiff's sporting events and to recognize Plaintiff's members and competitors. Plaintiff has also established and sanctioned twenty-one DockDogs affiliate clubs throughout the country to organize and execute Regional Competitions and to assist in training additional competitors for its events. Plaintiff incurs over $ 100,000 in costs each year to promote its canine athletic competitions and develop awareness of its brand and dog dock jumping events.

Defendant Splash Dogs is also engaged in the business of holding canine athletic events. Defendant Reed initially became interested in organizing and promoting dog dock jumping events after watching Plaintiff's Great Outdoor Games "Big Air" Competition on ESPN in the summer of 2003. Prior to watching this event, Defendant Reed was not aware of the sport of dog dock jumping. Thereafter, Defendant Reed began researching the sport on the internet and found a schedule **[*6]** of Plaintiff's upcoming events. Defendant Reed and his dog, Sierra, attended two of Plaintiff's competitions -- "The Incredible Dog Challenge" in San Francisco and the Western Regional Qualifying for the 2003 Great Outdoor Games in Reno, Nevada.

Following his participation in Plaintiff's events, Defendant Reed noticed that there were no upcoming dog dock jumping events scheduled on the West Coast. According to Defendant Splash Dogs' website, Defendant Reed began organizing and promoting dog dock jumping in order to increase the number of competitions held on the West Coast. Defendants Reed and Splash Dogs hosted their first canine dock jumping event in December 2003. In 2004, Defendant Splash Dogs held two events in San Mateo and Sacramento, California.

Beyond managing Defendant Splash Dogs, Defendant Reed worked for Plaintiff at two of its dock dog jumping events. In November 2005, Defendant Reed administered and assisted with the United States Dog Agility Association's ("USDAA") World Cynosport Games' dock jumping, which the USDAA held jointly with Plaintiff. In addition, Defendant Reed administered and assisted Plaintiff with a dog dock jumping event held in Las Vegas in February **[*7]** 2006. On March 9 through March 11, 2007, Defendants Splash Dogs, Reed, and Woods all held a dog dock jumping event in

[4] Plaintiff alleges that Defendant Nguyen has a number of alias names including Kim Nguyen, Thang Nguyen, and Thank Nguyen.

Columbus, Ohio. According to Defendant Splash Dogs' on-line schedule of events, the company has five events scheduled for 2009 -- two in California, two in Arizona, and one in Utah. Defendant Woods worked for Plaintiff as an independent contractor from 2002 until May 2005, working various events.

C. PLAINTIFF'S ALLEGATIONS

On April 16, 2008, Plaintiff filed a six-count Complaint in this Court alleging Copyright Infringement, Defamation, Deceptive Trade Practices under *Ohio Revised Code § 4165.02(A)(10)*, Tortious Interference with Business Relations, Deceptive Trade Practices under *Ohio Revised Code § 4165.02(A)(2)-(3)*, and Unfair Competition under *15 U.S.C. § 1125(a)(1)(A)*.

With respect to Plaintiff's claim for Copyright Infringement, Plaintiff alleges that Defendant Splash Dogs' "Rules & Regulations" are substantially similar to Plaintiff's "Rules & Policies," which are registered with the United States Copyright Office. Plaintiff published its "Rules & Policies" prior to the time that Defendant Splash Dogs drafted its "Rules & Regulations." Plaintiff contends that Defendants **[*8]** Splash Dogs, Reed, and Woods copied Plaintiff's "Rules & Policies" almost verbatim in drafting Defendant Splash Dogs' "Rules & Regulations." [5] Plaintiff also alleges that the above-mentioned Defendants knew that Plaintiff's "Rules & Policies" were protected by copyright when they participated in the drafting and preparation of Defendant Splash Dogs' "Rules & Regulations."

Plaintiff further contends that Defendants Reed and Woods -- in their individual capacity and on behalf of Defendant Splash Dogs -- made defamatory statements to third parties about Plaintiff. Plaintiff also alleges that Nguyen made defamatory statements to third parties about Plaintiff. Specifically, Plaintiff claims that Defendants told third parties that Plaintiff "lie[s]" and "cheat[s]" at its events, that Plaintiff's equipment is "second rate and very inaccurate," and that Plaintiff "has no idea what it is doing when it comes to electronics." (Complaint at P 62.) These statements were allegedly made to Bart Richardson (a California resident), Tom A. Dropik (a Minnesota resident), **[*9]** and Justin Tackett (an Arizona resident). Plaintiff does not allege that any of the Defendants defamed Plaintiff in Ohio. Plaintiff avers, however, that Defendant Woods posted defamatory statements about Plaintiff on Plaintiff's website. (Doc. 22, Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss at 15).

Plaintiff's claim for Deceptive Trade Practices pursuant to *Ohio Revised Code § 4165.02(A)(10)* is predicated upon the alleged defamatory statements recounted above. In particular, Plaintiff contends that by making defamatory statements, "Defendants have disparaged the goods, services, and/or business of Plaintiff by false representations of fact." (Complaint at P 71.)

Plaintiff also contends that Defendants Splash Dogs, Reed, and Woods contacted some of Plaintiff's corporate sponsors and asked them to sponsor Defendant Splash Dogs and forgo or reduce sponsoring Plaintiff. [6] Plaintiff alleges that these activities constituted Tortious Interference with Business Relations. Plaintiff claims that Defendants knew that Plaintiff and these corporations had business relations. Plaintiff further alleges that Defendants' actions caused Plaintiff harm. Specifically, Plaintiff contends **[*10]** that Splash Super Pools and Bass Pro Shops, Inc. reduced their sponsorship of Plaintiff and began sponsoring Defendant Splash Dogs. Plaintiff also alleges that "[a]s a result of intervention by Defendants, Defendant Splash Dogs now administers and organizes, and receives the benefits of, the USDAA's Cynosport World Games' canine dock jumping events." (Complaint at P 84.) Plaintiff does not, however, contend that Defendants contacted any of the corporate sponsors in Ohio.

Plaintiff further claims that Defendants Splash Dogs, Reed, and Woods engaged in deceptive trade practices in violation of *Ohio Revised Code § 4165.02(A)(2)-(3)*. In particular, Plaintiff alleges that "[b]y incorporating . . . numerous elements from Plaintiff's events and Plaintiff's Rules and Policies listed above into Defendant Splash Dogs' events and Rules & Regulations, Defendants Splash Dogs, Reed, and Woods have created a likelihood of confusion or misunderstanding **[*11]** as to the source, sponsorship, approval, or certification of Defendants' goods and services." (Complaint at P 95.) With respect to the similarities between Plaintiff and Defendants' dog dock jumping events, Plaintiff claims that "Defendants misappropriated and copied Plaintiff's divisions for scoring, distance breakouts, dock size and

[5] Plaintiff attached as Exhibit C to the Complaint a chart comparing its Rules & Policies to Splash Dogs' Rules & Regulations. (Doc. 1-4.)

[6] Plaintiff contends that Defendants contacted Cabela's, Nutro Products, Inc., Dokken Dog Supply, Inc., Splash Super Pools, Sport DOG Brand, Inc., Ducks Unlimited, Jordan Outdoor Enterprises, Ltd. (dba "Realtree"), Hydro Laboratories, and Bass Pro Shops, Inc.

dimensions, equipment requirements, site layout, equipment setup, pool size, award procedure, methods for manual judging, and division title and rankings."(Complaint at P 37.) Plaintiff also contends that Defendants made references to Plaintiff's past and current events in an attempt to misrepresent such events as the Defendant Splash Dogs' event. Plaintiff alleges that the references created a likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of Defendants' goods and services. Finally, Plaintiff claims that, by adopting the marks "SPLASH DOGS," and "GOT DOCK SPLASH DOGS.COM," Defendants Splash Dogs, Reed, and Woods have created a likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of Defendants' goods and services in violation of *Ohio Revised Code § 4165.02(A)(2)*.

Plaintiff's **[*12]** claim for Unfair Competition pursuant to *15 U.S.C. § 1125(a)(1)(A)* is predicated upon this same conduct. [7] In particular, Plaintiff claims that Defendants Splash Dogs, Reed, and Woods incorporated numerous elements from Plaintiff's events and Plaintiff's Rules & Policies into Defendant Splash Dogs' events and Rules & Regulations. Plaintiff further contends that this conduct, as well as Defendant Splash Dogs, Reed, and Woods' conduct of adopting marks similar to that of Plaintiff's marks is:

> likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendants with the Plaintiff, or as to the origin sponsorship, or approval of Defendants, their services, and/or their commercial activities by or with the Plaintiff and thus constitutes false designation of origin/unfair competition, in violation of Section 43(a)(1)(A) of the Lanham Act, *15 U.S.C. § 1125(a)(1)(A)*.

(Complaint at P 102.)

III. STANDARD [*13] OF REVIEW FOR A *RULE 12(b)(2)* MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

When a defendant moves to dismiss a complaint for lack of personal jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(2)*, the plaintiff bears the burden of demonstrating that personal jurisdiction exists. *Bird v. Parsons, 289 F.3d 865, 871 (6th Cir. 2002)*. A district court ruling on a motion to dismiss for lack of personal jurisdiction may rely on affidavits alone in reaching a decision, may permit discovery to assist with its decision, or may conduct an evidentiary hearing to resolve any apparent factual disputes. *Cleveland Browns Football Co., LLC v. Hawaii-Pacific Apparel, 90 Fed. Appx. 868, 869 (6th Cir. 2004)*. "The method selected is left to the discretion of the district court." *Faurecia Exhaust Sys., Inc., v. Walker, 464 F. Supp. 2d 700, 704 (N.D. Ohio 2006)*.

Where, as here, the court considers defendant's motion based on affidavits alone and neither has the benefit of discovery, nor conducts an evidentiary hearing, the pleadings and affidavits must be construed in a light most favorable to the plaintiff and the plaintiff must only advance a *prima facie* showing of personal jurisdiction **[*14]** in order to overcome the defendant's motion. *Preferred Capital, Inc. v. Assocs. in Urology, 453 F.3d 718, 720 (6th Cir. 2006)*. "Dismissal in this procedural posture is proper only if all the specific facts which the plaintiff . . . alleges collectively fail to state a *prima facie* case for jurisdiction." *CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996)*. (emphasis added).

In order to determine whether personal jurisdiction over a particular defendant exists, a district court must apply the law of the forum state, subject to the limits of the *Due Process Clause of the Fourteenth Amendment*. *Theunissen v. Matthews, 935 F.2d 1454, 1459 (6th Cir. 1991)*. As such, a federal court sitting in either diversity or federal question jurisdiction must apply a two-pronged test for personal jurisdiction -- (1) "the defendant must be amenable to suit under the forum state's long-arm statute and (2) the due process requirements of the Constitution must be met." *Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110, 1115 (6th Cir. 1994)*.

IV. PERSONAL JURISDICTION ANALYSIS

A. STEP ONE OF THE PERSONAL JURISDICTION ANALYSIS -- THE OHIO LONG-ARM STATUTE

The first step of the personal jurisdiction **[*15]** analysis requires the Court to apply the Ohio long-arm statute. The Court finds that Defendants Splash Dogs, Reed, and Woods are subject to personal jurisdiction for each claim under the Ohio long-arm statute and that Defendant Nguyen is subject to personal jurisdiction for Defamation and Deceptive Trade Practices, pursuant to *Ohio Revised Code § 4165.02(A)(10)*, under the Ohio

[7] Although the Unfair Competition claim is the sixth Count alleged in the Complaint, Plaintiff mistakenly captions it as Count V, not Count VI. The Court treats this as a clerical error and will refer to the Unfair Competition claim as Count VI.

long-arm statute.

The relevant portions of the Ohio long-arm statute, O.R.C. § 2307.382, provide:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
> (1) Transacting any business in this state;
> . . .
> (6) Causing tortious injury in this state to any person by an act or omission outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state.

Furthermore, according to O.R.C. § 2307.382(C), "[w]hen jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him." Thus, "[l]ong-arm jurisdiction, unlike general jurisdiction, exists only as **[*16]** to causes of action arising out of the particular contacts on which jurisdiction is based." Preferred RX, Inc. v. Am. Prescription Plan, Inc., 46 F.3d 535, 550 (6th Cir. 1995). As such, in order to exercise personal jurisdiction over Defendants, the Court must analyze each cause of action individually to determine whether that the particular claim arises out of Defendants' contacts with Ohio. [8]

1. Copyright Infringement

This Court finds that Defendants Splash Dogs, Reed, and Woods [9] not only transacted business in Ohio, but also caused tortious injury in Ohio by an act outside the state which they reasonably should have expected to injure an Ohio resident. Further, the Court concludes that Plaintiff's cause of action for Copyright Infringement at least partially arose out of Defendants' contacts with Ohio. As such, this Court has personal jurisdiction under the Ohio long-arm statute with respect to Plaintiff's Copyright Infringement claim as to Defendants Splash Dogs, Reed, and Woods pursuant to O.R.C. § 2307.382 (A)(1) and (A)(6).

i. Defendants Splash Dogs, Reed, and Woods Transacted Business in Ohio.

This Court has personal jurisdiction over Defendants Splash Dogs, Reed, and Woods under O.R.C. § 2307.382(A)(1) because these Defendants have "transacted business" in Ohio. The Ohio Supreme Court has held that O.R.C. § 2307.382(A)(1) is very **[*18]** broadly worded and "permits jurisdiction over non-resident defendants who are transacting any business in Ohio." Kroger Co. v. Malease Foods Corp.., 437 F.3d 506, 511 (6th Cir. 2006) (emphasis added) (citing Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc., 53 Ohio St. 3d 73, 75, 559 N.E.2d 477 (1990)). "Transact" as utilized in the phrase "transacting any business" means to prosecute negotiations; to carry on business; [and] to have dealings . . . ." Mansfield Props., LLC v. Med. Dev. Mgmt., LLC, 08-CV-668, 2008 U.S. Dist. LEXIS 70841, at *20 (September 5, 2008 N.D. Ohio); *see also,* Goldstein v. Christiansen, 70 Ohio St. 3d 232, 236, 1994 Ohio 229, 638 N.E.2d 541 (1994) (citing Kentucky Oaks, 53 Ohio St. 3d at 75.) Furthermore, "[t]he word embraces in its meaning the carrying on or prosecution of business negotiations but it is a broader term than the word 'contract' and may involve business negotiations which have been either wholly or partly brought to a conclusion." Burnshire Dev., LLC v. Cliffs Reduced Iron Corp. 198 Fed. Appx. 425, 431 (6th Cir. 2006). Moreover, physical presence within the state is not a prerequisite to finding personal jurisdiction. Faurecia, 464 F. Supp 2d at 706. The Sixth Circuit has held that a **[*19]** person "'transacts business' in Ohio if the business operations set in motion by the defendant have a 'realistic impact' on Ohio commerce." Priess v. Fisherfolk, 535 F. Supp. 1271, 1274 (S.D. Ohio 1982) (citing In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 221 (6th Cir 1972)).

Here, Defendants Splash Dogs, Reed, and Woods held a three-day canine sporting event in Columbus, Ohio,

---

[8] The Plaintiff does not assert that personal jurisdiction is based on anything other than the provisions of the Ohio long-arm statute, O.R.C. § 2307.382. Therefore, the Court need not consider the question of whether step one of the personal jurisdiction analysis could be premised on general jurisdiction in this case, as the Federal Circuit and, arguably, the Sixth Circuit, has interpreted Ohio law to hold. *See* Delta Sys. Inc. v. Indak Mfg. Corp., 4 Fed. Appx. 857 (Fed. Cir. 2001) (following LSI Indus. Inc. v. Hubbell Lighting, Inc., 232 F.3d 1369, 1371 (Fed. Cir. 2000)); *see, e.g.,* Brunner v. Hampson, 441 F.3d 457, 463 (6th Cir. 2006). The Court merely notes, once again, that Ohio law on this issue is at least debatable. *See* Avery Dennison Corp., v. Alien Tech. Corp., 08 CV 795, 2008 U.S. Dist. LEXIS 98173, at *19-20 (N.D. Ohio Dec. 4, 2008) **[*17]** (O'Malley, J.) (citing Swinson v. FedEx Nat'l, Inc., No. 1:08cv1028, 2008 U.S. Dist. Lexis 76292, at *2-4 (N.D. Ohio Aug. 28, 2008) (O'Malley, J.)).

[9] The Complaint does not assert a claim for copyright infringement against Defendant Nguyen.

from March 9 through March 11, 2007. Furthermore, it is undisputed that Defendants Reed and Woods worked for Plaintiff, an Ohio corporation. In November 2005, Defendant Reed worked for Plaintiff administering and assisting with the USDAA World Cynosport Games' dock jumping, which the USDAA held jointly with Plaintiff. In February 2006, Defendant Reed also administered and assisted Plaintiff with an event in Las Vegas. Further, from 2002 until May 2005, Woods worked as an independent contractor for Plaintiff. Plaintiff paid Defendants Reed and Woods for their services through an Ohio bank account. Finally, Plaintiff and Defendant Woods also entered into two other agreements involving dock rental and dock storage.

First, it is clear that Defendant Splash Dogs' event, held in Columbus and administered **[*20]** by Defendants Woods and Reed, had an impact on Ohio commerce. These Defendants marketed this event to Ohio residents through Defendant Splash Dogs' website and allowed Ohio residents to register for the event on that website. Furthermore, Defendants invited individuals to Columbus to attend and participate in their canine athletic event. Moreover, Defendants rented the "Columbus Pet Expo" in order to host this event. Thus, the Defendants "transacted business" in Ohio by virtue of this contact alone.

Defendants Reed's and Woods' employment relationships with the Ohio-based Plaintiff further support the conclusion that these Defendants "transacted business" in Ohio. Notably, this employment relationship spanned a number of years, during which Plaintiff paid Defendants from an Ohio bank account. Consequently, Defendants Splash Dogs, Reed, and Woods "transacted business," as that term is defined in the Ohio long-arm statute, in Ohio.

In order to demonstrate that the defendants are subject to personal jurisdiction under the Ohio long-arm statute, the plaintiff must not only demonstrate that the defendants transacted business in Ohio, but also that the "cause of action ar[ose] from the business **[*21]** transacted . . ." *O.R.C. § 2307.382(C)*. Defendants contend that plaintiff's claims are unrelated to Defendants' contacts with Ohio because "Splash Dogs' rules and regulations . . . did not exist at the time" that they hosted their canine athletic event in Columbus. Essentially, the Defendants argue that, because they had not drafted their "Rules & Regulations" until after the Columbus event, Plaintiff's claims could not have arisen out of that event.

The Court finds that the Copyright Infringement cause of action asserted by Plaintiff does arise, at least partially, out of Defendants Splash Dogs, Reed, and Woods' contacts with Ohio. Defendant's argument ignores the as yet unresolved factual debate over whether the allegedly infringing "Rules & Regulations" *were* drafted prior or subsequent to the Columbus event. Plaintiff contends the Defendants' rules in fact were in place before the Columbus event. Under the standard for ruling on a motion to dismiss for lack of personal jurisdiction, this Court cannot "consider facts proffered by the defendant that conflict with those offered by the plaintiff." *See Bird, 289 F.3d at 872* (finding that all inferences had to be drawn in favor of the **[*22]** plaintiff although the plaintiff's assertion that defendant sold 4,666 domain names to Ohio residents "lack[ed] any direct factual support"). Accordingly, the Court finds that Plaintiff's cause of action for Copyright Infringement at least partially arose out of Defendants Splash Dogs, Reed, and Woods' contacts with Ohio.

ii. Defendants Splash Dogs, Reed, and Woods' Conduct Falls Within Sub-Section (A)(6) of the Ohio Long-Arm Statute

Even if this Court were to conclude that Defendants Splash Dogs, Reed, and Woods did not promulgate Defendant Splash Dogs' "Rules & Regulations" until after the March 2007 event, this Court has personal jurisdiction over these Defendants with respect to Plaintiff's Copyright Infringement claim under the Ohio long-arm statute pursuant to *O.R.C. § 2307.382(A)(6)* because these Defendants caused tortious injury to the Ohio-based Plaintiff by an act outside the state which they should have expected to cause injury to the Plaintiff. The Ohio long-arm statute provides:

> [a] court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action from the person's . . . [c]ausing tortious injury in this state to any person by **[*23]** an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state.

O.R.C. § 2307.382(A)(6). The Sixth Circuit has held that "because a plaintiff whose trademark has been violated potentially suffers economic harm as a result of the defendant's actions, the injury occurs both in the places where the plaintiff does business and in the state where

its primary office is located." [10] Bird, 289 F.3d at 876; *see also,* Cash Homebuyers, Inc v. Morningstar, Inc., No.5:05 CV 2296, 2006 U.S. Dist. LEXIS 72674, 2006 WL 2869564, *1,*4 (N.D. Ohio Oct. 5, 2006) (holding that plaintiff alleging copyright infringement established personal jurisdiction under O.R.C.§ 2307.382(A)(6) when the plaintiff alleged that the defendant used, downloaded, and distributed plaintiff's copyrighted materials); Panavision Int'l v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998) (finding that the "brunt" of the harm suffered by plaintiff due to copyright infringement occurred at plaintiff's principal place of business).

Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship., 34 F.3d 410 (7th Cir. 1994) is particularly instructive here. In *Indianapolis Colts*, the court held that the defendants were subject to personal jurisdiction in Indiana based on an alleged trademark infringement committed by the defendants in Baltimore. Id. at 412. There, the Canadian Football League ("CFL") named its new Baltimore-based team the "Baltimore CFL Colts." Id. at 411. Thereafter, the Indianapolis Colts and the National Football League brought suit alleging trademark infringement based upon the substantially similar name chosen by the CFL. *Id*. The defendants contended that they were not subject to personal jurisdiction in Indiana because the team's only contact with the state was the broadcast **[*25]** of its games on nationwide cable television. *Id*. The Seventh Circuit rejected this argument and found that "[i]f the trademarks are impaired . . . the injury will be felt mainly in Indiana." *Id*. Further, the court expressed skepticism as to whether any additional contacts would be necessary to establish personal jurisdiction over the defendants, but ultimately deferred that issue because the defendants had an additional contact with the state of Indiana. Id. at 411-12. Specifically, the court determined that the defendants "entered" the state through their broadcasts. Id. at 412. As such, the court found that the defendants were subject to personal jurisdiction in Indiana. *Id*.

This court finds the rationale of Indianapolis Colts persuasive. Thus, applying the facts of *Indianapolis Colts* to this case, it is clear that Defendants Splash Dogs, Reed, and Woods are amenable to suit in Ohio for their alleged copyright infringement. Both the plaintiffs in that case and the Plaintiff here primarily use their intellectual property in the desired forum. Further, as in *Indianapolis Colts*, the injury caused by the conduct of Defendants Splash Dogs, Reed, and Woods will be felt most severely in **[*26]** the Plaintiff's principal place of business -- Ohio. Finally, the additional contacts offered in support of plaintiff's position in *Indianapolis Colts* are less compelling than those alleged by plaintiff in this case. As stated above, in *Indianapolis Colts*, the defendants' only additional contact with the forum was the broadcasting of the games into the state. By contrast, Defendants Splash Dogs, Reed, and Woods actually made a physical entry into the state and held a three-day event in Columbus, Ohio. Accordingly, under the same rationale, Defendants Splash Dogs, Reed, and Woods are subject to personal jurisdiction under the Ohio long-arm statute in Ohio for their alleged copyright infringement.

2. Defamation

The Court finds that it has personal jurisdiction with respect to the defamation claim under the Ohio long-arm statute over each Defendant. The alleged defamatory statements rendered by the Defendants, outside of Ohio, caused tortious injury to the Ohio-based Plaintiff, in Ohio, and Defendants knew and reasonably should have known that such statement would cause Plaintiff injury.

As discussed above, a defendant is subject to personal jurisdiction under the Ohio long-arm statute -- **[*27]** specifically O.R.C. § 2307.382 (A)(6) -- where that defendant causes tortious injury in Ohio by an act committed outside of the state when he "might reasonably have expected that some person would be injured in Ohio." Farr v. Spatial Tech., Inc., 152 F.R.D. 113, 116 (S.D. Ohio 1993). A defendant who posts defamatory statements about an Ohio-based plaintiff on the internet is amenable to suit in Ohio under O.R.C. § 2307.382 (A)(6). Kauffman Racing Equip. v. Roberts, 2008 Ohio 1922, 2008 WL 1821374, at *3 (Ohio App. Ct. 5th Dist. 2008). Furthermore, where defamatory statements are made outside of the state with the purpose of injuring an Ohio resident and there is a reasonable expectation that injury will occur in Ohio, the requirements of O.R.C. § 2307.382 (A)(6) are satisfied. Farr, 152 F.R.D. at 116.

---

[10] It should be noted that the Bird Court analyzed the issue of personal jurisdiction under O.R.C. § 2307.382(A)(4) of the Ohio long-arm **[*24]** statute. That section of the Ohio long-arm statute also subjects a defendant to personal jurisdiction for "tortious injury in [Ohio] by an act or omission outside [of Ohio] . . ." *Id*. However, (A)(4) only applies when the defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in [Ohio]." *Id*.

In this case, Plaintiff alleges that Defendants Splash Dogs, Reed, Woods, and Nguyen made numerous false and defamatory statements about Plaintiff. Specifically, Plaintiff contends that Defendants stated to third parties that Plaintiff "lies" and "cheats" at its events, that Plaintiff's "scoring methods and equipment are second rate and very inaccurate," and that Plaintiff "has **[*28]** no idea what it is doing when it comes to electronics." (Complaint at PP 62-64.) Plaintiff claims that Defendants made these statements to Bart Richardson, Tom Dropik, and Justin Tackett. None of these individuals is an Ohio resident. Plaintiff also avers that Defendant Woods posted defamatory statements on Plaintiff's website, which is administered and maintained in Ohio. Although Plaintiff does not expressly address where the Defendants uttered the allegedly defamatory statements, it does not dispute Defendant's assertion that the statements were made outside of Ohio. Further, Plaintiff's reliance upon *O.R.C. § 2307.382 (A)(6)* confirms that any supposed defamation did not occur in Ohio, as that section concerns an act or omission committed outside of the state.

First, this Court finds *Kauffman* dispositive on the issue of whether Woods is subject to personal jurisdiction under the Ohio long-arm statute for defamation. *2008 Ohio 1922, 2008 WL 1821374 at *3*. In that case, the defendant purchased an engine block and related equipment from the plaintiff--an Ohio Limited Liability Company. *2008 Ohio 1922, Id. at *1*. Thereafter, a dispute arose between the plaintiff and the defendant as to whether the product was defective. **[*29]** *Id*. While the defendant insisted that the engine block was defective, the plaintiff maintained that it had been substantially modified and refused to repurchase it. *Id*. As a result of this dispute, the defendant posted messages on various internet websites criticizing the plaintiff and its products. *Id*. In response, the plaintiff commenced suit alleging defamation. *Id*. Despite a jurisdictional challenge, the state court found defendant amenable to suit in Ohio because he posted the defamatory messages on the internet. *2008 Ohio 1922, Id. at *3*. In so holding, the court determined that the defendant's act of posting the messages on the internet was committed with the purpose of injuring the plaintiff. *Id*.

In applying *Kauffman* to this case, it is clear that Woods is subject to personal jurisdiction in Ohio under *O.R.C. § 2307.382 (A)(6)* because both the defendant in *Kauffman* and Defendant Woods posted allegedly defamatory statements on internet websites. The Court concludes, moreover, that the exercise of personal jurisdiction over Woods, under the Ohio long-arm statute, is even more compelling than was the assertion of jurisdiction over the defendant in *Kauffman* since Woods made his defamatory statement **[*30]** on a website maintained and administered in Ohio. Accordingly, this Court has personal jurisdiction under *O.R.C. § 2307.382 (A)(6)* over Woods, with respect to the defamation claim.

The Court also finds that personal jurisdiction has been established under *O.R.C. § 2307.382 (A)(6)* over Defendants Splash Dogs, Reed, and Nguyen. [11] This conclusion is based upon the plain language of *(A)(6)* as well as the broad manner in which this section has been applied.

Under *O.R.C. § 2307.382 (A)(6)*, a plaintiff seeking to establish personal jurisdiction need only demonstrate that the defendant "caus[ed] tortious injury in this state . . . by an act or omission outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured" in Ohio. Here, Plaintiff has clearly satisfied these elements. In particular, Plaintiff -- an Ohio-based **[*31]** company with its principal place of business in Medina, Ohio -- alleges that it suffered harm as a result of Defendant Splash Dogs, Reed, and Nguyen making defamatory statements to third parties outside of Ohio. Further, Plaintiff contends that these Defendants knew that such statements would cause injury to Plaintiff in Ohio. Consequently, this Court has personal jurisdiction over Defendants Splash Dogs, Reed, and Nguyen for defamation under the Ohio long-arm statute. *See also, Farr, 152 F.R.D. at 116* (subjecting the defendant to personal jurisdiction under *O.R.C. § 2307.382 (A)(6)* where the defendant made defamatory remarks to plaintiff during a phone conversation and the "subject phone call was . . . made outside the state, for the purpose of injuring [plaintiff]" in Ohio).

3. Deceptive Trade Practices Under *Ohio Revised Code § 4165.02(A)(10)*

The Court finds that each Defendant is subject to personal jurisdiction under the Ohio long-arm statute, *O.R.C. § 2307.382 (A)(6)*, with respect to Plaintiff's Deceptive Trade Practices claim pursuant to *O.R.C. §*

---

[11] While Defendant Woods allegedly posted defamatory statements about Plaintiff on the internet, the Plaintiff does not contend the other Defendants engaged in such conduct. Rather, Plaintiff alleges that Defendants Splash Dogs, Reed, and Nguyen made verbal statements to third parties defaming Plaintiff.

4165.02(A)(10). [12] Plaintiff avers that, by making the defamatory statements, outlined in the previous section, "Defendants have disparaged **[*32]** the goods, services, and/or business of Plaintiff DockDogs by false representations of fact . . ." (Complaint at P 71.) Thus, Plaintiff's claim for Deceptive Trade Practices is predicated upon the same conduct described above. Accordingly, applying the analysis from the preceding section to this claim, the Court determines that each Defendant is subject to personal jurisdiction under the Ohio long-arm statute for Deceptive Trade Practices under O.R.C. § 4165.02(A)(10).

4. Tortious Interference with Business Relations

A defendant is amenable to suit in Ohio for tortious interference pursuant to O.R.C. § 2307.382 (A)(6) where he engages in tortious interference out of state which he reasonably expects will injure the plaintiff in Ohio. Omega Cable & Comm'ns, Inc. v. Time Warner, Inc., No.5: 05 CV 1780, 2006 U.S. Dist. LEXIS 50258, at *6-7 (N.D. Ohio July 24, 2006). In *Omega*, **[*33]** defendant Texas Cable told defendant Time Warner Cable's Northeast Ohio Division ("TWNO") that plaintiff Omega engaged in false billing in connection with a contract between TWNO and Omega. Id. at *4. Texas Cable also advised TWNO to terminate its contract with Omega. *Id*. Shortly thereafter, TWNO ended its contractual relationship with Omega predicating the termination, in part, on false billing. *Id*. In response, Omega brought suit in Ohio under the Ohio Deceptive Trade Practices Act alleging tortious interference with business relations. *Id*. The defendants moved to dismiss for lack of personal jurisdiction on grounds that Texas Cable contacted TWNO from Texas. *Id*. The Court denied defendants' motion and held that "Omega properly state[d] a *prima facie* case that Texas Cable's out-of-state conduct caused tortious injury to Omega in Ohio." Id. at *8. (emphasis added). The Court also concluded that Texas Cable "reasonably expected its out of state conduct to injure Omega in the state of Ohio." Id. at *8-9. Thus, the Court found jurisdiction proper under the Ohio long-arm statute, O.R.C. § 2307.382 (A)(6).

Applying the facts in Omega to the facts in this case, the Court concludes that Defendants **[*34]** Splash Dogs, Woods, and Reed are subject to personal jurisdiction for Tortious Interference with Business Relations under the Ohio long-arm statute. [13] Similar to the defendant in *Omega*, who contacted TWNO and insisted that it cease its contractual relationship with Omega, Defendants Splash Dogs, Reed, and Woods allegedly asked Plaintiff's sponsors to stop sponsoring the Plaintiff or to reduce their sponsorship of the Plaintiff. (Complaint at P 81.) Likewise, both the defendant in *Omega* and the Defendants in this case knew that the particular plaintiffs and the contacted entities were engaged in business relations. (Complaint at PP 87, 90.) Furthermore, like the defendant in *Omega*, the Defendants here allegedly committed tortious interference outside the state of Ohio under circumstances which they reasonably expected would injure Plaintiff in Ohio. (Complaint at PP 77, 89.) As such, this Court has personal jurisdiction over Defendants Splash Dogs, Woods, and Reed with respect to Plaintiff's claim for Tortious Interference with Business Relations under the Ohio long-arm statute.

5. Deceptive Trade Practices Under Ohio Revised Code § 4165.02(A)(2)-(3) and Unfair Competition

As discussed above, this Court finds that Defendants Splash Dogs, Reed, and Woods "transacted business" in Ohio as defined in O.R.C. § 2307.382(A)(1). Furthermore, the Court concludes that Plaintiff's claims for Deceptive Trade Practices under O.R.C. § 4165.02(A)(2)-(3) [14] and Unfair Competition arise out of

---

[12] Section 4165.02(A)(10) of the Ohio Revised Code provides:

> (A) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following:
>
> . . .
>
> (10) Disparages the goods, services, or business of another by false representation of fact . . . .

[13] The Complaint alleges that "Splash Dogs, Reed, and Woods, and possibly others" tortiously interfered with **[*35]** Plaintiff's relationships with its sponsors. (Complaint at P 77.) Such vague language is insufficient to state a claim against anyone other than the defendants expressly named.

[14] Sections 4165.02(A)(2)-(3) of the Ohio Revised Code provide as follows:

> (A) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following:
>
> . . .
>
> (2) Causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causes likelihood of confusion or misunderstanding

Defendants Splash Dogs, Reed, and Woods' [15] transacting business in Ohio as required by *O.R.C. § 2307.382(C)*.

At the outset, this Court's determination that Splash Dogs, Reed, and Woods transacted business in Ohio is based in large part on the fact that each of these Defendants hosted and attended Splash Dogs' March 2007 canine athletic event held in Columbus, Ohio. Defendants, however, continually argue that no cause of action could have arisen out of this event because Splash Dogs' "Rules and Regulations" were not promulgated until after the event. The Court disagrees with Defendants' contention for two reasons. First, as stated previously, this is a disputed fact which must be weighed in favor of the Plaintiff upon a motion to dismiss for lack of personal jurisdiction. Moreover, even if Defendants did not draft their rules until after the Columbus event, they would still be subject to personal jurisdiction for Deceptive Trade Practices and Unfair Competition because Plaintiff alleges several times that the Defendants' events themselves infringe Plaintiff's rights. Specifically, Plaintiff contends that Defendants "misappropriated and copied numerous aspects of Plaintiff's business and wrongfully incorporated **[*37]** them into Defendants' business." (Complaint at P 37.) In particular, Plaintiff claims that Defendants "copied Plaintiff's divisions for scoring, distance breakouts, dock size and dimensions, equipment requirements, site layout, equipment setup, pool size, award procedure, methods for manual judging, and division titles and rankings." *Id*. Further, Plaintiff specifically states in its causes of action for Deceptive Trade Practices and Unfair Competition that "[b]y incorporating the numerous elements from Plaintiff's events . . . into Defendant Splash Dogs' events . . . Defendants Splash Dogs, Reed, and Woods have created a likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of Defendants' goods and services in violation of *Ohio Revised Code § 4165.02(A)(2)*." (Complaint at PP 95, 102.) Thus, Defendants' contention that they drafted their rules after holding the Columbus event largely is irrelevant to this Court's personal jurisdiction determination. Consequently, this Court has personal jurisdiction under the Ohio long-arm statute over Defendants Splash Dogs, Woods, and Reed with respect to Plaintiff's claims for Deceptive Trade Practices **[*38]** pursuant to *O.R.C. § 4165.02 (A)(2)-(3)* and Unfair Competition.

B. STEP TWO OF THE PERSONAL JURISDICTION ANALYSIS - DUE PROCESS

Having concluded that the Ohio long-arm statute is satisfied as to each claim against each Defendant, the Court now turns to step two of the personal jurisdiction analysis. "The Court must determine whether the exercise of [personal] jurisdiction comports with constitutional due process." *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc., 503 F.3d 544, 550 (6th Cir. 2007)* (request for reh'g en banc denied). In Ohio, a defendant may be subject to either general or specific jurisdiction. *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co., 91 F.3d 790, 793 (6th Cir. 1996)*. The Plaintiff does not argue that general jurisdiction exists in this case. Consequently, the Court's analysis is limited to the standards applicable to specific jurisdiction.

A defendant will be subject to specific jurisdiction in cases in which the subject matter of the lawsuit "arises out of or is related to the defendant's contacts with the forum." *Conti v. Pneumatic Prods. Corp., 977 F.2d 978, 981 (6th Cir. 1992)*. For the reasons stated below, this Court has specific personal jurisdiction **[*39]** over Defendants Splash Dogs, Reed, Woods and Nguyen with respect to all of Plaintiff's claims.

In order for a state to exercise personal jurisdiction over a non-resident defendant, consistent with the *Due Process Clause*, the defendant must have sufficient minimum contacts with the forum state such that the exercise of jurisdiction over the defendant does not "offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*. The Sixth Circuit has created a three-prong test to determine whether specific jurisdiction may be exercised over a defendant consistent with the *Due Process Clause*.

> First, the defendant must purposefully avail himself of the privilege of of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Third, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of personal jurisdiction over the defendants reasonable.

> as to affiliation, connection, or association with, or certification by, another . . **[*36]** . .

[15] The Plaintiff is not asserting this particular claim against Defendant Nguyen.

Scotts Co. v. Aventis S.A., 145 Fed. Appx. 109, 113 (6th Cir. 2005) (citing Southern Machine v. Mohasco Industries, 401 F.2d 374, 381 (6th Cir. 1968)).

According **[*40]** to the *Southern Machine* Court, the "purposeful availment" prong is the "'*sine qua non*' for personal jurisdiction." Id. at 381-82. Requiring that the defendant purposefully avail himself of the privilege of acting in the forum state ensures that he will not be "haled into a jurisdiction for random, fortuitous, or attenuated contacts." Calphalon Corp. v. Rowlette, 228 F.3d 718, 721-22 (6th Cir. 2000). Further, the purposeful availment requirement "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). "When performing a purposeful availment analysis, it is the *quality* rather than the *quantity* of contacts that is the subject of review." Ohio Bureau of Worker's Compensation v. MDL Active Duration Fund, No. 2:05-CV-0673, 2006 U.S. Dist. LEXIS 35448,*32 (S.D. Ohio June 1, 2006) (citing LAK v. Deer Creek Enters., 885 F.2d 1293, 1301 (6th Cir. 1989)).

In order to establish personal jurisdiction over a defendant, the plaintiff must also demonstrate that "the cause **[*41]** of action arises from the defendant's activities" in Ohio. Southern Machine, 401 F.2d at 374. The "arising from" prong "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only 'that the cause of action, of whatever type *have a substantial connection with* the defendant's in-state activities.'" Third Nat'l Bank in Nashville v. WEDGE Group, Inc., 882 F.2d 1087, 1091 (quoting Southern Machine, 401 F.2d at 384 n.27) (emphasis in original).

The final prong of the *Southern Machine* test is that "the acts of the defendant or consequences caused by the defendant . . . have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." Southern Machine, 401 F.2d at 384. When the first two prongs of *Southern Machine* are met, "[a]n inference arises that the third factor is satisfied." Bird, 289 F.3d at 875. Thus, "[o]nly in an unusual case will the reasonableness element be absent where the first two elements are present." Delta Media Group, Inc. v. The Kee Group, Inc. and Greyhound Techs., LTD., No.5:07CV 01597, 2007 U.S. Dist. LEXIS 80878, *18 (N.D. Ohio Oct. 31, 2007).

[*42] The factors relevant to the reasonableness inquiry include, "the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, and the interest of other states in securing the most efficient resolution of controversies." CompuServe, Inc., 89 F.3d at 1268.

Personal jurisdiction is analyzed as to each claim against each Defendant. *See* Hunter v. Mendoza, 197 F. Supp. 2d 964, 971-72 (N.D Ohio. 2002). Accordingly, the Court will divide the analysis that follows based upon specific claims (or categories of similar claims) against specific Defendants (or groups of similarly-situated Defendants).

1. Copyright Infringement, Deceptive Trade Practices Pursuant to Ohio Revised Code § 4165.02(A)(2)-(3), and Unfair Competition

Plaintiff's claims for Copyright Infringement, Deceptive Trade Practices under O.R.C. § 4165.02(A)(2)-(3) and Unfair Competition will be analyzed together as each relates directly to the Defendants' presentation of canine dock jumping events similar to Plaintiff's events.

i. This Court's Exercise of Personal Jurisdiction Over Defendant Splash Dogs Does Not Offend the Due Process Clause.

a. Purposeful Availment

The Court finds that Defendant **[*43]** Splash Dogs purposefully availed itself of the privilege of conducting business in Ohio by virtue of its website, www.splashdogs.com, and by promoting and holding a canine athletic event in Columbus, Ohio. The operation of an Internet website constitutes purposeful availment of acting in a forum state, "if the website is interactive to a degree that reveals specifically intended interaction with residents of the state." Bird, 289 F.3d at 874 (quoting Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002)). In *Bird*, the Court held that the defendants satisfied the purposeful availment requirement by maintaining a website on which Ohio residents could register domain names and by accepting the business of 4,666 Ohio residents. *Id*. In that case, the Dotster defendants maintained a website which allowed individuals and corporations to register an Internet domain name. Id. at 870. Another defendant, Parsons, registered an Internet domain name on Dotster's website. *Id*. Thereafter, the plaintiff brought suit against these and other defendants alleging that the domain name which Parson's registered infringed

plaintiff's domain name. *Id*. The Dotster defendants moved to dismiss **[*44]** the suit against them pursuant to Rule 12(b)(2). *Id*. The Court found that the Dotster defendants had sufficient minimum contacts with Ohio to subject them to personal jurisdiction in that state by virtue of maintaining the website and by accepting the business of 4,666 Ohio residents. [16] *Id. at 874*.

Following the rationale applied in *Bird*, this Court finds that Defendant Splash Dogs is subject to personal jurisdiction in Ohio -- exercising personal jurisdiction over this Defendant as to these claims does not offend constitutional due process. While the Dotster defendants and Defendant Splash Dogs both maintain an Internet website, this Court agrees with Plaintiff that Defendant Splash Dogs' website is far more targeted toward Ohio and Ohio residents than the website at issue in *Bird*. In *Bird*, the Dotster defendants merely maintained a website which was generally available for individuals **[*45]** and companies to register domain names and did not target any specific forum. Conversely, Defendant Splash Dogs' website targeted Ohio residents in order to promote and solicit participation in the March 2007 Columbus event and continues to target Ohio residents by keeping the results from that event posted. In particular, Plaintiff claims that "by clicking on 'Upcoming Events'. . . an Ohio resident could (1) learn about the 'Columbus Pet Expo' where the event was held, (2) obtain 'Schedule and Event Info,' and (3) even 'Register Now' to participate in the event." (Doc. 22 at 21). Furthermore, Defendant Splash Dogs, like the Dotster defendants, has an additional contact with Ohio -- the Columbus event. Just as the Dotster defendants sold domain names to Ohio residents, Defendant Splash Dogs accepted registration fees from numerous Ohio residents that participated in the Columbus event. Even more compelling, Defendant Splash Dogs not only accepted registration and admission fees from Ohio residents, but actually held the three-day event in Ohio. Accordingly, Defendant Splash Dogs purposefully availed itself of the privilege of conducting business in Ohio such that it does not "offend **[*46]** traditional notions of fair play and substantial justice" to subject it to jurisdiction in Ohio. *See* Int'l Shoe, 326 U.S. at 316.

[16] It should be noted that the plaintiff in *Bird* did not actually proffer evidence demonstrating that the Dotster defendants had sold 4,666 domain names to Ohio residents. *Id. at 872*. Rather, the plaintiff estimated that number by dividing the total number of domain name sales in the United States by 50. *Id*.

ii. Arise From

The Court concludes that Plaintiff's claims for Copyright Infringement, Deceptive Trade Practices pursuant to O.R.C. § 4165.02(A)(2)-(3), and Unfair Competition arise from Defendant Splash Dogs' core policies and practices, in particular, maintenance of its website and/or its hosting the canine athletic event in Columbus. As discussed previously, "[t]his factor does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only 'that the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities.'" *Bird, 289 F.3d at 875* (quoting *Third Nat'l Bank, 882 F.2d at 1091*). In *Bird*, the court found the "arise from" prong satisfied based upon the plaintiff's allegations that the Dotster defendants committed copyright and trademark law violations by registering Parson's domain name and the Dotster defendants' contacts with Ohio were "at least marginally related to the alleged contacts between the Dotster defendants and Ohio." *Id*.

Here, the **[*47]** claims arise from Defendant Splash Dogs' hosting of the March 2007 Columbus event for several reasons. First, Plaintiff alleges that Defendant Splash Dogs used its allegedly infringing "Rules & Regulations" at its March 2007 Columbus event. Further, Plaintiff claims that the manner in which the event itself is run violates O.R.C. § 4165(A)(2)-(3) and constitutes unfair competition. Specifically, in its motion in opposition to Defendants' motion to dismiss, Plaintiff contends that Defendant Splash Dogs' Columbus event is an example of an infringing event. Finally, with regard to Defendant Splash Dogs' website, the supposedly infringing rules are electronically available through this platform and the Defendant used the website to promote and accept registration for the Columbus event. Consequently, Plaintiff's claims for Copyright Infringement, Deceptive Trade Practices pursuant to Ohio Revised Code § 4165(A)(2)-(3) and Unfair Competition arise out of Defendant Splash Dogs' contacts with Ohio.

iii. Reasonableness

The final *Southern Machine* prong is that the exercise of jurisdiction over the particular defendant be reasonable "in light of the connection that allegedly exists between the **[*48]** . . . defendants and Ohio." *Bird, 289 F.3d at 875*. In *Bird*, the court noted that the Dotster defendants could not legitimately object to the burden of defending suit in Ohio because they transacted business with Ohio

residents and "Ohio has a legitimate interest in protecting the business interests of its citizens . . ." *Id.* Likewise, Defendant Splash Dogs cannot avoid defending suit in Ohio because it has transacted business in this forum through its website as well as the canine athletic event held in Columbus. Although it may be more convenient for the Defendant to litigate this case in California, that fact alone does not mitigate this forum's interest in protecting the business interests of the Ohio-based Plaintiff. Thus, this Court's exercise of personal jurisdiction over Defendant Splash Dogs is reasonable. Accordingly, the Plaintiff has sustained its burden of demonstrating that this Court has personal jurisdiction over Defendant Splash Dogs.

b. This Court's Exercise of Personal Jurisdiction Over Defendants Reed and Woods Does Not Violate the Due Process Clause

i. Purposeful Availment

"The intentional act of entering into a contract with a resident of Ohio is sufficient to satisfy **[*49]** the purposeful availment requirement." *Delta Media Group, Inc., 2007 U.S. Dist. LEXIS 80878 at *14*; (citing *Southern Machine, 401 F.3d at 382-83*). In *Delta Media Group*, the defendant entered into a contract with the Ohio-based plaintiff whereby the latter agreed to design and host a website for the defendant. *Delta Media Group, Inc., 2007 U.S. Dist. LEXIS 80878 at *3*. This contractual relationship lasted from 2002 to 2006. *Id*. Subsequently, the plaintiff brought suit against the defendant for copyright infringement alleging that defendant's new website infringed copyrights held by plaintiff. *Id*. In considering defendant's motion to dismiss for lack of personal jurisdiction, the court held that the defendant's contacts with Ohio -- including, negotiating an agreement with the Ohio-based plaintiff, communicating with the plaintiff regarding the agreement, and sending payment to Ohio -- were sufficient to subject the defendant to personal jurisdiction in Ohio. *Id. at *14*. Furthermore, in rejecting defendant's motion, the court noted that the agreement between the plaintiff and the defendant required regular communications over a period of several years. *Id*.

As in *Delta Media Group*, "Defendants **[*50]** Reed and Woods had regular oral and written contacts with Plaintiff in Ohio . . ." (Doc. 22 at 23.) Furthermore, similar to the contractual relationship between the plaintiff and the defendant in *Delta Media Group*, the employment relationship between Plaintiff and Defendants Reed and Woods spanned a number of years during which time the Defendants were paid from an Ohio bank account. While there is a discrepancy as to whether Defendants Reed and Woods worked as independent contractors -- as Plaintiff contends -- or full-time employees -- as the Defendants maintain -- it is clear that the employment relationship involved multiple contacts over a significant period of time between the Defendants and the Ohio-based Plaintiff. Therefore, Defendants Reed's and Woods' decision to enter into this relationship alone constitutes purposeful availment of conducting business in the forum state. *See also, Faurecia, 464 F. Supp. 2d at 707* (finding that the defendant purposefully availed himself of the privilege of conducting business in Ohio by entering into an employment agreement with an Ohio corporation and accepting compensation and benefits through the Ohio entity). Moreover, Defendants Reed **[*51]** and Woods purposefully availed themselves of conducting business in Ohio by promoting and hosting Defendant Splash Dogs' canine athletic event held in Columbus.

ii. Arise From

Plaintiff's claims for Copyright Infringement, Deceptive Trade Practices pursuant to *Ohio Revised Code § 4165.02(A)(2)-(3)*, and Unfair Competition arise from Defendants Reed's and Woods' contacts with Ohio. First, as discussed above, Plaintiff claims that the manner in which Defendant Splash Dogs' administers its canine athletic events, including the Columbus event, constitutes infringement. Furthermore, Plaintiff contends that the Defendants' incorporated numerous elements from Plaintiff's events into Defendant Splash Dogs' events creating a likelihood of confusion in violation of *O.R.C.§ 4165.02(A)(2)-(3)*. For the same reason, the Plaintiff also alleges that the manner in which Defendants Reed and Woods administer Defendant Splash Dogs' events constitutes unfair competition. Beyond Defendant Reed and Woods holding and promoting the Columbus event, the employment relationship between these Defendants and Plaintiff also relates to Plaintiff's claims. Specifically, Plaintiff suggests that the Defendants "learned **[*52]** many of Plaintiff's methods and procedures for holding, promoting, and organizing canine dock jumping events" while working for Plaintiff. (Complaint at P 32.) Accordingly, Plaintiff's claims arise out of Defendants Reed and Woods' contacts with Ohio.

iii. Reasonableness The Defendants' contacts with Ohio are such that the exercise of personal jurisdiction over them is reasonable. Although Defendants Reed and Woods will be inconvenienced by defending suit in

Ohio, Plaintiff's interest in obtaining relief is compelling. Furthermore, Ohio has a legitimate interest in protecting the Ohio-based Plaintiff. *See* Bird, 289 F.3d at 875. Moreover, while Defendant Reed is a resident of California, Defendant Woods is an Indiana resident, thereby undercutting any interest California might have in resolving the controversy. As such, Plaintiff has shown that personal jurisdiction over Defendants Reed and Woods in Ohio is reasonable. Consequently, this Court's exercise of personal jurisdiction over Defendants Reed and Woods with respect to Plaintiff's claims for Copyright Infringement, Deceptive Trade Practices pursuant to O.R.C. § 4165.02(A)(2)-(3), and Unfair Competition comports with due process.

2. [*53] Tortious Interference with Business Relations

Rather than attempt to demonstrate that Plaintiff's Tortious Interference claims arose out of Defendants' physical contacts with Ohio, Plaintiff relies heavily upon the "effects test" -- announced in *Calder v. Jones* -- to establish personal jurisdiction over the Defendants. 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). For the reasons articulated below, the Court finds Calder controlling.

In *Calder*, the plaintiff brought suit against two Florida-based writers based upon an article that they authored for the National Enquirer magazine. 465 U.S. at 785. Upon the defendants' motion to dismiss for lack of personal jurisdiction, the Supreme Court held the writers amenable to jurisdiction in California because "California [was] the focal point both of the story and the harm suffered." Id. at 789. In so holding, the Court relied on the facts that the article concerned the California activities of an "entertainer whose television career centered in California." Id. at 788. The Court also noted that of the five million copies of the magazine circulated throughout the United States, 600,000 were sold in California. Id. at 785. Thus, the Court held that the defendants could **[*54]** "reasonably anticipate being haled into court" in California. Id. at 790.

Since *Calder*, the Sixth Circuit has applied the "effects test" narrowly "by evaluating whether a defendant's contacts with the forum may be enhanced if the defendant expressly aimed its tortious conduct at the forum and plaintiff's forum state was the focus of the activities of the defendant out of which the suit arises." *Scotts Co.*, 145 Fed. Appx. at n.1. In particular, the Sixth Circuit has held that the fact that a foreign organization could foresee that allegedly defamatory statements would be circulated and have an effect in Ohio is not, in itself, enough to create personal jurisdiction. Reynolds, 23 F.3d at 1120. In *Reynolds*, the International Amateur Athletic Federation (IAAF) issued a press release acknowledging that Reynolds -- an Ohio resident and international track athlete -- tested positive for steroid use during a random drug test conducted in Monaco. Id. at 1112. As a result of this press release, Reynolds brought suit in Ohio alleging, among other claims, defamation and tortious interference with business relations. Id. at 1113. In attempting to establish specific personal jurisdiction over the **[*55]** IAAF, Reynolds argued that his claims arose out of the IAAF's contacts with Ohio because the IAAF intentionally defamed him and interfered with his Ohio business relationships. Id. at 1120. Essentially, Reynolds relied on the *Calder* "effects test" and alleged that, as in that case, the brunt of the harm would be felt in the desired forum - Ohio. *Id*. The court rejected this broad reading of *Calder* and distinguished that case for several reasons.

> First, the press release concerned Reynolds' activities in Monaco, not Ohio. Second, the source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France. Third, Reynolds is an international athlete whose professional reputation is not centered in Ohio. Fourth, the defendant itself did not publish or circulate the report in Ohio; Ohio periodicals disseminated the report. Fifth, Ohio was not the "focal point" of the press release. The fact that the IAAF could foresee that the report would be circulated and have an effect in Ohio is not, in itself, enough to create personal jurisdiction.

Id. Consequently, the court held that it could not, consistent with due process, exercise personal jurisdiction over **[*56]** the IAAF. *Id*.

i. Purposeful Availment

This Court has personal jurisdiction over Defendants Splash Dogs, Reed, and Woods with respect to Plaintiff's claim for Tortious Inference with Business Relations under the Calder "effects test." In *Reynolds*, the court stated that "although Reynolds lost Ohio corporate endorsement contracts and appearance fees in Ohio, there is no evidence that the IAAF knew of the contracts or of their Ohio origin." 23 F.3d at 1120.

Of particular relevance to this case is Scotts Co, 145 Fed. Appx. at 114-115. In that case, the plaintiff and a French corporation negotiated and executed a contract in Ohio whereby the plaintiff agreed to purchase the

corporation's lawn and garden business. Id. at 110. The contract contained a clause requiring the corporation to offer to sell the plaintiff any controlling interest it acquired in a consumer plant care and household insecticide company within three months from the date on which it acquired the interest. Id. at 110-111. Subsequent to this agreement, a merger ensued between the corporation and Aventis, one of the defendants to the action. Id. at 111. Thereafter, a subsidiary of Aventis acquired a controlling interest in a **[*57]** consumer plant care and household insecticide company. *Id*. When the plaintiff discovered this acquisition it sought to enforce its contractual right to purchase the controlling interest in the company. *Id*. Ultimately, the plaintiff was not able to acquire the interest in the lawn and insecticide company, allegedly due to tortious interference by Aventis, and Aventis transferred this interest to StarLink, the other defendant to the action. *Id*. Plaintiff commenced an action against Aventis and StarLink for restitution and tortious interference with contractual relations. *Id*. In deciding whether to dismiss the action for lack of personal jurisdiction, the court relied upon the *Calder* "effects test" to hold the defendants amenable to suit in Ohio. Id. at 113-115.

In *Scotts Co*., the Sixth Circuit found the case more analogous to *Calder* than to *Reynolds* mostly because "both [d]efendants knew of the connection between the Master Contract and the forum state, Ohio, and further knew that the Master Contract was not merely an isolated transaction, but rather, one that contemplated the possibility of future assets purchases . . ." Id. at 114. The court also noted that the defendants knew that **[*58]** the brunt of the harm would be felt in Ohio and that Ohio was the focal point of the damages. *Id*. Specifically, the court held that the defendants "purposefully directed activities at a resident of Ohio that caused consequences in the forum state and that they therefore should have reasonably foreseen that they could be haled into an Ohio court as a result." Id. at 114-115.

Applying the facts in Scotts Co. to the facts of this case, the Court finds that Defendants purposefully directed any alleged tortious interference toward Ohio. First, in contrast to the defendant in Reynolds and similar to the defendants in *Scotts Co*., Defendants here allegedly knew that Plaintiff had valuable business relations with the identified corporate sponsors. Likewise, just as the defendants in *Scotts Co*. knew that the contract was not an isolated transaction but involved a continuing relationship, Plaintiff here contends that Defendants knew that Plaintiff had prospective business relations with the corporate sponsors. Thus, while it is true that the Defendants contacted Plaintiff's corporate sponsors outside of Ohio, taking the Plaintiff's facts as true, the Defendants knew that these corporations had **[*59]** contractual relationships with the Ohio-based Plaintiff and, despite this knowledge, contacted these entities and asked them to reduce their sponsorship of, or forgo sponsoring, Plaintiffs. Thus, unlike in *Reynolds*, Defendants here knew of both the contracts and their Ohio origins. It is much likely, moreover, that the Defendants knew that this conduct would have consequences in Ohio. In particular, the allegedly tortious interference had a direct relationship to the forum because the contracts themselves were based in Ohio. Consequently, this Court finds that Defendants Splash Dogs, Woods, and Reed purposefully directed any tortious interference at Ohio.

ii. Arise From

As stated above, the "arise from" prong "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only that the cause of action, of whatever type has a substantial connection with the defendant's in-state activities." Third Nat'l Bank, 882 F.2d at 1091. Here, although Plaintiff does not allege that Defendants engaged in tortious interference in connection with their Columbus event, Plaintiff at least suggests that Defendants employment relationship **[*60]** with Plaintiff was related to Defendants' tortious interference. (*See* Complaint at P 84 (stating that "[a]s a result of intervention by Defendants, Defendant Splash Dogs now administers and organizes, and receives the benefits of, the USDAA's Cynosport World Games' canine dock jumping events. Defendant Reed previously worked on the Cynosport World Games events as a representative of Plaintiff DockDogs").) Accordingly, the Court finds that Plaintiff's cause of action for Tortious Interference with Business Relations arises from Defendants' contacts with Ohio.

iii. Reasonableness

As a consequence of finding the first two Southern Machine prongs satisfied, there is an inference that subjecting the Defendants to suit in Ohio is "reasonable." *See* First Nat. Bank of Louisville v. J.W. Brewer Tire Co., 680 F.2d 1123, 1126 (6th Cir. 1982). In *Scotts Co*., the court noted that "it cannot be disputed that Ohio has an interest in resolving a suit brought by one of its residents against [d]efendants that

purposefully availed themselves of acting in and causing consequences in Ohio." *145 Fed. Appx. at 115*. Just as in that case, the Court here recognizes that Ohio has a compelling interest in resolving **[*61]** a controversy involving allegedly tortious interference of a contract between corporate sponsors and an Ohio resident. As such, the exercise of personal jurisdiction over Defendants Splash Dogs, Woods, and Reeds is reasonable. Consequently, this Court has specific personal jurisdiction over these Defendants with respect to Plaintiff's claim for Tortious Interference with Business Relations.

3. Defamation and Deceptive Trade Practices Under O.R.C. § 4165.02(A)(10)

This Court finds that it has jurisdiction over all of the Defendants except Nguyen with respect to Plaintiff's claims for Defamation and Deceptive Trade Practices pursuant to *Ohio Revised Code § 4165.02(A)(10)*. These claims do not arise out of the Defendants' physical contacts with Ohio. It is also questionable whether the *Calder* "effects test" could be used to establish personal jurisdiction over the Defendants. The Court finds, however, that, under the particular circumstances of this case, the doctrine of supplemental or "pendent" **[*62]** personal jurisdiction permits the Court to exercise personal jurisdiction over all of the claims against the Defendants who are subject to personal jurisdiction with respect to the claims analyzed above.

Pendent personal jurisdiction is a common law doctrine that recognizes the inherent fairness of exercising personal jurisdiction over claims asserted against a Defendant over whom the Court already has personal jurisdiction with respect to another claim or claims arising out of the same nucleus of operative facts. [17]

Under such circumstances, Courts have recognized that exercising pendent personal jurisdiction over claims the Court would not have personal jurisdiction over if they arose independently satisfies Due Process concerns and serves judicial efficiency. Although the Sixth Circuit has not explicitly recognized pendent personal jurisdiction, other Circuits, *see, e.g.,* *Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 719 (2d Cir. 1980)*, and district courts, including some within the Sixth Circuit, *see, e.g.,* *Jude v. First Nat'l Bank of Williamson, 259 F. Supp. 2d 586, 596 (E.D. Ky. 2003)*, have used the doctrine in cases such as this one. *See generally* Linda Sandstrom Simard, *Exploring* ***[*63]*** *the Limits of Specific Personal Jurisdiction*, *62 Ohio St. L. J. 1619, 1625, n.25-26 (2001)*; 4A Charles A. Wright & Arthur R. Miller, *Federal Prac. & Proc*. § 1069.7 (2008). [18]

In this case, the Court may exercise pendent personal jurisdiction over the Defamation and *O.R.C. § 4165.02(A)(10)* Deceptive Trade Practices claims against Defendants Splash Dogs, Reed, and Woods. These claims are factually related to the other claims in this lawsuit -- over which the Court has already found personal jurisdiction -- because the Complaint alleges a concerted and, apparently, coordinated, effort on the part of Splash Dogs and its employees to unlawfully harm Plaintiff's business enterprise for Splash Dogs' benefit. Thus, the Defamation and *O.R.C. § 4165.02(A)(10)* Deceptive Trade Practices claims arise out of the same nucleus of operative facts and the Court may exercise pendent personal jurisdiction over all of the claims against Splash Dogs, Reed, and Woods.

The Court may not, however, exercise pendent personal jurisdiction over Defendant Nguyen. The only claims asserted against Nguyen **[*65]** are the Defamation and *O.R.C. § 4165.02(A)(10)* Deceptive Trade Practices claims. The Court finds that it does not have personal jurisdiction over Nguyen based on the traditional Due Process analysis or the *Calder* effects

---

[17] As explained by Wright & Miller, the rule requiring personal jurisdiction over each defendant *as to each claim* gives rise to myriad complications in cases involving multiple defendants and claims. Pendent personal jurisdiction seeks to address these issues.

> The personal jurisdiction discussion in the preceding sections has focused on how and when a district court may exercise personal jurisdiction over a particular defendant. However, it is important to remember that a plaintiff also must secure personal jurisdiction over a defendant with respect to each claim she asserts. This often can be a source of frustration for both the plaintiff and the district court. . . . [I]n these cases fairness to the individual nonresident defendant usually is balanced against considerations of judicial efficiency, the federal policy against piecemeal litigation, and the plaintiff's convenience and need for a forum.

4A Charles A. Wright & Arthur R. Miller, *Federal Prac. & Proc*. § 1069.7 (2008).

[18] Many cases in which the court invokes **[*64]** pendent personal jurisdiction involve federal claims under a statute permitting nationwide service of process. *See* Simard, *62 Ohio St. L. J. at 1626, n.26*. A significant number of courts have used pendent personal jurisdiction in cases that do not involve such a claim, however. *Id. at 1630*.

test. Simply put, there is no allegation that Nguyen ever set foot in Ohio, and the alleged defamatory statements were made to out-of-state third-party individuals with no meaningful connection to Ohio. This situation is analogous to *Reynolds*, not *Calder*. *See also Cadle v. Schlichtmann, 123 Fed. Appx. 675 (6th Cir. 2005)*. Thus, unlike the other Defendants, the Court does not have personal jurisdiction over Nguyen with respect to an "anchor" claim [19] that could be used as the basis of pendent personal jurisdiction. Accordingly, the Defendants' motion to dismiss for lack of personal jurisdiction is **GRANTED** with respect to the claims asserted against Nguyen.

C. SUMMARY OF PERSONAL JURISDICTION ANALYSIS

For the reasons discussed above, this Court has personal jurisdiction over all of the claims asserted against all of the Defendants except Nguyen, over whom the Court does not have personal jurisdiction with respect to any claims. Accordingly, **[*66]** the Defendant's motion to dismiss for lack of personal jurisdiction is **DENIED in part and GRANTED in part**. The claims against Nguyen are **DISMISSED**.

VII. VENUE ANALYSIS

Having fully analyzed the Defendants' motion to dismiss for lack of personal jurisdiction pursuant to *Rule 12(b)(2)*, the Court now turns to the Defendants' *Rule 12(b)(3)* motion to dismiss for improper venue and their motion to transfer the case to the United States District Court for the Central District of California pursuant to *28 U.S.C. § 1404*. The issue with respect to the *Rule 12(b)(3)* motion is whether the Northern District of Ohio is a proper venue. The issue with respect the motion to transfer is whether the Central District of California is a more appropriate venue under the standards and factors applicable to the statute, *28 U.S.C. § 1404*.

If it is appropriate to grant the Defendants' motion to transfer the case to the Central District of California, then the Court need not analyze the *Rule 12(b)(3)* motion to dismiss for improper venue. *See Plaskolite, Inc. v. Zhejiang Taizhou Eagle Mach. Co., Ltd., No. 08cv487, 2008 U.S. Dist. LEXIS 99395, 2008 WL 5190049, at *1-2 (S.D. Ohio Dec. 9, 2008)* (noting that a court lacking personal jurisdiction **[*67]** may nonetheless transfer the case). Accordingly, the Court turns first to the motion to transfer under *§ 1404*.

A. TRANSFER OF VENUE PURSUANT TO *28 U.S.C. § 1404*

For the reasons stated below, the Court finds that transfer of venue to the Central District of California is not appropriate under the circumstances.

Section 1404(a) provides:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any district or division where it might have been brought.

28 U.S.C. § 1404(a). "The statute's literal language requires that the transfer would serve the interests of justice, and that the transferred action could have been brought in the transferee court." *Bunting v. Gray, 2 Fed. Appx. 443, 448 (6th Cir. 2001)*. The requirement that the transferred action could have been brought in the transferee district has been interpreted to mean that "[i]f when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where [the action] might have been brought.' *Hoffman v. Blaski, 363 U.S. 335, 344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)*.

If the court concludes that the action could have been brought in the **[*68]** transferee district, then it must weigh a number of factors, including case-specific factors such as the convenience of the parties and witnesses, the relative ease of access to proof, and the availability of compulsory process, and public-interest factors such as the relative burdens of the courts and local interest in the dispute. *See Kerobo v. Sw. Clean Fuels Corp., 285 F.3d 531, 537 (6th Cir. 2002)*. The court should also consider the relative congestion of the fora and the familiarity of the courts with the applicable law. *Eberline v. Ajilon LLC, 349 F. Supp. 2d 1052, 1053-54*. Finally, the Plaintiff's choice of forum is also a factor. *See Donia v. Sears Holding Corp., 2008 U.S. Dist. LEXIS 43532, 2008 WL 2323533, at *4 n.2 (N.D. Ohio May 30, 2008)* (O'Malley, J.). The Plaintiff's choice of forum, however, "is not of paramount importance; it is instead one factor to be weighed equally with other relevant factors." *Id*. (quoting *Int'l Union, U.A.W. v. Aluminum Co. of Am., 875 F. Supp. 430, 433 (N.D. Ohio 1995)* (O'Malley, J.)). Indeed, no one factor is dispositive; rather, transfer is appropriate if the balance of these factors "strongly" favors trying the case in the transferee district. *See Picker Int'l, Inc. v. Travelers Indem. Co., 35 F. Supp.2d 570, 573 (N.D. Ohio 1998)*; **[*69]** *Mid-West Materials, Inc. v. Tougher Indus., Inc., 484 F. Supp. 2d 726, 734 (N.D. Ohio 2007)*.

---

[19] Simard, 62 Ohio St. L. J. at n.27.

Before balancing the above-mentioned factors, the Court must determine whether the action could have been brought in the Central District of California. The Defendants claim that Plaintiff could have commenced this action in the Central District of California because "all of the named [D]efendants have stipulated to have this matter transferred to the [that district] . . . and [b]oth Splash Dogs, LLC, Reed, and Woods do business in, and have substantial contacts with [that district]." (Defendant's Motion to Dismiss at 9). Under, *Hoffman, 363 U.S. at 344*, it is "immaterial" that Defendants have consented to personal jurisdiction and venue in the Central District of California subsequent to Plaintiff's filing this action. However, in light of the Court's analysis of the *§ 1404* factors, the Court will assume that each Defendant had substantial enough contacts with the transferee district such that Plaintiff could have commenced suit there in the first instance.

1. Convenience of Parties and Witnesses

First, the Court must determine whether the convenience of the parties weighs in favor of transferring **[*70]** this case to the Central District of California. In making this decision, the convenience of all parties must be taken into account. *Apex Sales Agency v. Phoenix Sintered Metals, Inc., No. 1:06 CV 01203, 2006 U.S. Dist. LEXIS 77302, *6 (N.D. Ohio 2006)* (emphasis added). Furthermore, "[w]hen transferring a case would only serve to shift the burden of inconvenience from one party to the other, transfer is not appropriate." *Id*. (citing *Roberts Metals, Inc. v. Florida Props. Marketing Group, Inc., 138 F.R.D. 89, 94 (N.D. Ohio 1991)*). In this case, while Defendants Splash Dogs, Reed and Nguyen reside in California, only Nguyen resides in the Central District of California. [20] Moreover, Defendant Woods resides in Indiana and Plaintiff resides in Wyoming and Ohio. Although Defendants claim that Woods works for Defendant Splash Dogs and has substantial contacts with the Central District of California, there is no evidence that it would be more convenient for him to travel to California to defend this suit than to Ohio -- a state bordering Indiana, where he resides. As such, the Court concludes that transferring this case from the Northern District of Ohio to the Central District of California **[*71]** would merely shift the burden from Defendants Splash Dogs and Reed to Plaintiff. Accordingly, this factor does not militate in favor of transferring venue to the Central District of California.

The Court must not only take into account the convenience of the parties in considering whether to grant Defendants' motion to transfer, but also the convenience of the witnesses. Where witnesses are spread across the country, it is less likely that transferring the case to an alternative forum will be more convenient for the witnesses involved. *Avery Dennison Corp., v. Alien Tech. Corp., 08 CV 795, 2008 U.S. Dist. LEXIS 98173 (N.D. Ohio Dec. 4, 2008)*. Moreover, "[w]hen a party's out-of-state witnesses are its own employees, the inconvenience is greatly reduced because the party should have no difficulty compelling the employees' presence at trial." *T&W Forge, Inc. v. V&L Tool, Inc., 05-CV-1637, 2005 U.S. Dist. LEXIS 24619, at *31 (N.D. Ohio Oct. 21, 2005)*; *Neff Ath. Lettering Co. v. Walters, 524 F. Supp. 268, 273 (S.D. Ohio 1981)*. **[*72]** Here, Plaintiff's employees, who will testify on the Plaintiff's behalf, are located in the Northern District of Ohio. Furthermore, Plaintiff alleges that Defendant "Splash Dogs distributed its infringing materials and held actionable events (generating corresponding witnesses and financial documents) all over including, for example, in Ohio, Arizona, Texas, North Carolina, Utah, Nebraska, Kansas, and Nevada." (Doc. 22 at 34.) Furthermore, while Defendants allege that one of Plaintiff's corporate sponsors does business in California, Plaintiff avers that witnesses testifying on their behalf with respect to the Tortious Interference claim reside throughout the country. The Defendants also argue that two members of Defendant Splash Dogs' rules committee, who helped draft the allegedly infringing "Rules & Regulations," reside in California. While the Court agrees with Defendants that these witness would probably prefer to testify in California rather than 2,500 miles away in Ohio, the Court also finds the potential prejudice to the Defendants' mitigated by the fact that these witness are employed by Defendant Splash Dogs and thus are less likely to evade testifying. Accordingly, the Court **[*73]** finds that the convenience of the witnesses does not weigh in favor of transferring this case to the Central District of California.

2. Access to Proof and Availability of Compulsory Process

Additional factors relevant to a court's determination of whether to transfer venue include the relative ease of access to proof as well as the availability of compulsory process. *Rustal Trading US, Inc. v. Makki, 17 Fed.*

[20] While Plaintiff initially named Tracy Hughes -- a resident of the Central District of California -- as a Defendant in this action, it later filed a motion to voluntarily dismiss her from the suit. (Doc. 28.)

Appx. 331, 336 (6th Cir. 2001); Shanehchian v. Macy's, Inc., 251 F.R.D. 287, 290 (S.D. Ohio 2008). Defendants argue that the "access to proof" factor weighs in favor of transferring venue. In particular, Defendants claim that "all of the proof regarding Plaintiff's allegations can only be found in California with [the] [D]efendants." (Doc. 15 at 11.) As with the witnesses, however, it appears that any potential sources of proof are not concentrated in any particular location. Defendant Splash Dogs distributed allegedly infringing materials and held allegedly infringing events throughout the country. (Doc. 22 at 34.) Moreover, as Plaintiff emphasizes, "Defendants have failed to identify even one fact or source of evidence that would be accessible or available if this action were **[*74]** to proceed in the Central District of California," as opposed to the Northern District of Ohio. *Id*. at 36. Furthermore, all parties will have an equal opportunity to subpoena witnesses regardless of where this action is brought. Consequently, the Defendants have failed to demonstrate that these factors favor transferring this action to the Central District of California.

3. Public Interest Factors

The Court must not only weigh case-specific factors when deciding whether to transfer venue, but must also consider certain public-interest factors. Sirak v. J.P. Morgan Chase & Co., 5:08CV169, 2008 U.S. Dist. LEXIS 94328, *3 (N.D. Ohio Nov. 5, 2008). The relevant public-interest factors include: the relative burdens of the courts, local interest in the dispute, relative congestion of the fora, and the familiarity of the courts with the applicable law. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). With respect to the latter factor, "[t]here is an appropriateness . . . in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign **[*75]** to itself." Id. at 509. In this case, Plaintiff is asserting its claims for Tortious Interference and Deceptive Trade Practices under Ohio law. As such, it is apparent that this Court is more familiar with Ohio law than the Central District of California. This factor weighs heavily against transfer to the Central District of California.

Furthermore, there is clearly a local interest in the resolution of this dispute as it involves potential tortious conduct against an Ohio resident. Indeed, Plaintiff has submitted evidence, in the form of a third-party affidavit, indicating that the Defendants' motion to transfer is part of an ongoing effort to subject Plaintiff to costly and burdensome litigation. (Doc. 22-4, Decl. of Bart Richardson.) Ohio has an interest in protecting its resident businesses from such predatory conduct at the hands of foreign entities. This fact, which is supported by an affidavit the Court accepts as true in the procedural context of this case, also clearly militates against transfer based on traditional equitable principles.

Finally, Defendants have failed to demonstrate that the Central District of California has a lighter docket or will be less burdened by handling **[*76]** this litigation than the Northern District of Ohio. Accordingly, Defendants have failed to demonstrate that these public-interest factors weigh in favor of transferring venue.

Defendants, however, assert an additional rationale for transferring venue to the Central District of California. Specifically, Defendants claim that under the "first-to-file" rule the Orange County Superior Court in California has priority to resolve this case. Essentially, Defendants argue that this Court should defer to the California state court due to the pendency of a substantially similar cause of action filed prior to this action. [21] The Defendants' argument fails, however. Under the first-to-file rule, "when actions involving nearly identical parties and issues are filed in two different *district courts*, the court in which the first suit was filed should generally proceed to judgment." Zimmer Enters., Inc. v. Atlandia Imports, Inc., 478 F. Supp. 2d 983, 987 (S.D. Ohio 2007) (emphasis added). Thus, as Plaintiff recognizes, this rule generally applies in cases pending concurrently in different federal district courts. *See* id.(stating that the first-to-file rule is a well-established doctrine that encourages **[*77]** comity among federal courts of equal rank). Therefore, the fact that there is a potentially similar action pending in California state court does not weigh in favor of this Court transferring venue to the Central District of California.

Upon balancing both the case-specific factors and the public-interest factors, the Court concludes that Defendants have failed to demonstrate that the balance of convenience weighs strongly in favor of transfer. *See* Bacik, 888 F. Supp. at 1414. Consequently, Defendants' motion to transfer venue to the Central District of California is **DENIED**.

---

[21] The Court does not reach the issue of whether the actions are, in fact, "substantially similar" because of the conclusion that the first-to-file rule does not apply in this context.

B. *RULE 12(b)(3)* MOTION TO DISMISS FOR IMPROPER VENUE

Since discretionary transfer to the Central District of California is not appropriate, the Court must resolve the Defendants' *Rule 12(b)(3)* motion to dismiss for improper venue.

1. Standard of Review for a *Rule 12(b)(3)* Motion

When a defendant seeks to dismiss a claim for improper venue pursuant to *Fed. R. Civ. P. 12(b)(3)*, plaintiff bears the burden of proving that venue is proper. *Centerville ALF, Inc. v. Balanced Care Corp., 197 F. Supp. 2d 1039, 1046 (S.D. Ohio 2002)*. **[*78]** A district court considering a motion to dismiss for improper venue may rely on affidavits alone, may conduct an evidentiary hearing, or may permit discovery to aid it in deciding the motion. *Id*. "If the court determines that the motion can be decided without a hearing, it 'must consider the pleadings and affidavits in the light most favorable to the plaintiff.'" *Id*. (citing *Welsh v. Gibbs, 631 F.2d 436, 439 (6th Cir. 1980)*). In this procedural posture, the plaintiff must only advance a *prima facie* showing that venue is proper as to each defendant. *Zimmer Enters., Inc., 478 F. Supp. 2d at 986*; *I.A., Inc. v. Thermacell Techs., Inc., 983 F. Supp. 697, 700 (E.D. Mich. 1997)* (emphasis added).

When a plaintiff asserts a cause of action for copyright infringement, venue is determined under *28 U.S.C. § 1400(a)*. *The Lubrizol Corp., v. Neville Chem. Co., 463 F. Supp. 33 (N.D. Ohio 1978)*. Pursuant to *§ 1400(a)*, "[c]ivil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found." *28 U.S.C. § 1400(a)*. "A corporation is deemed to **[*79]** reside in any district 'in which it is subject to personal jurisdiction at the time the action is commenced.'" *In re LimitNone, LLC, No. 08-3499, 551 F.3d 572, 2008 U.S. App. LEXIS 26955, *6 (7th Cir. Dec. 19, 2008)* (citing *28 U.S.C. § 1391(c)*); *see also Janmark, Inc., v. James T. Reidy and Dreamkeeper, Inc., 132 F.3d 1200, 1203 (7th Cir. 1997)* (finding the definition of "reside" found in *§ 1391(c)* applicable to venue determination under *§ 1400(a)*). Likewise, an individual defendant "may be found" in any federal district in which he or she is subject to personal jurisdiction. *Walker v. Concoby, 79 F. Supp. 2d 827, 835 (N.D. Ohio 1999)*; *Milwaukee Concrete Studios v. Fjeld Mfg. Co., 8 F.3d 441, 445 (7th Cir. 1993)*; *Palmer, Star's Edge, Inc. v. Eldon Brown, 376 F.3d 1254 (11th Cir. 2004)*; *Mihalek v. State of Michigan, 595 F. Supp. 903, 907 (E.D. Mich. 1984)*; *Foxworthy v. Custom Tees, Inc., 879 F. Supp. 1200, 1207 (N.D. Ga. 1995)*. Accordingly, whether Plaintiff's copyright infringement claim is properly venued in the Northern District of Ohio depends upon whether Defendants Splash Dogs, Reed, and Woods would be subject to personal jurisdiction in that district if it were a separate state. *See Walker, 79 F. Supp. 2d at 835* **[*80]** (finding venue proper because the defendants were subject to personal jurisdiction in the Northern District of Ohio).

The other claims -- Defamation, Deceptive Trade Practices Pursuant to Ohio law, Tortious Interference, and Unfair Competition -- are governed by the general statute, *28 U.S.C. § 1391(b)*. Ultimately, however, the analysis still turns on whether the Defendants are subject to personal jurisdiction with respect to these claims in the Northern District of Ohio. Under the general venue statute,

> [a] civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). *Sub-section (b)(1)* is inapplicable to this case because each Defendant to this action does not reside **[*81]** in the same State. *Sub-section (b)(3)* does not apply here because there is at least one other district in which these claims may be brought -- the Southern District of Ohio. Therefore, in order for venue to lie in the Northern District of Ohio, Plaintiff must demonstrate that a substantial part of the events or omissions giving rise to the claim occurred in that district as provided in *§ 1391(b)(2)*.

2. Venue for the Copyright Infringement Claim, *O.R.C. § 4165.02(A)(2)-(3)* Deceptive Trade Practices Claims, Tortious Interference, and Unfair Competition

i. Copyright Infringement, Deceptive Trade Practices Pursuant to *Ohio Revised Code § 4165.02(A)(2)-(3)*, and Unfair Competition Claims

The Court's analysis of whether Plaintiff's Copyright

Infringement, Deceptive Trade Practices Pursuant to Ohio Revised Code § 4165.02(A)(2)-(3), and Unfair Competition claims are properly venued in the Northern District of Ohio excludes the Defendants' contacts with the Southern District of Ohio. *See* Avery Dennison Corp., 2008 U.S. Dist. LEXIS 98173, at *41. As such, Defendant Splash Dogs' canine athletic event held in Columbus, Ohio in March 2007 is irrelevant to the Court's venue determination as that event **[*82]** occurred in the Southern District of Ohio. With this in mind, the Court finds that Defendant Splash Dogs would not be subject to personal jurisdiction with respect to Plaintiff's copyright claim in the Northern District of Ohio if it were a separate state. As the personal jurisdiction analysis makes clear, the Columbus event is the central contact for purposes of exercising personal jurisdiction with respect to these Defendants and claims. Accordingly, the Court concludes that these claims are not properly venued in the Northern District of Ohio.

Instead, it is apparent that a proper venue for these claims is the Southern District of Ohio, where Splash Dogs' Columbus event took place. As discussed above, the core claims over which the Ohio courts have personal jurisdiction -- *i.e.*, the "anchor' claims -- are the Copyright Infringement claim, the closely related Deceptive Trade Practices Claim under O.R.C. § 4265.02(A)(2)-(3), and the Unfair Competition claim under the Federal Lanham Act. Since these anchor claims are not properly venued in the Northern District of Ohio, but are fundamentally tied to the Southern District of Ohio, it is appropriate to use the pendent venue doctrine to **[*83]** transfer the remaining claims over which the Ohio courts have personal jurisdiction to the Southern District of Ohio. As discussed above in detail, Plaintiff's specifically allege that the Defendants unlawfully used and appropriated Plaintiff's intellectual property and business practices in staging competitive canine dock jumping events, including one in the Southern District of Ohio. Accordingly, the Southern District of Ohio is the jurisdiction most associated with the conduct at issue with respect to these claims. It may exercise personal jurisdiction over them for the reasons stated above, and it is an appropriate venue because the same considerations applicable to personal jurisdiction in Ohio generally are operative with respect to the Southern District of Ohio specifically.

It is well-established that a district court should transfer some or all of the claims in a case when it finds that it cannot exercise personal jurisdiction or venue is improper. *See* Delta Media Group, Inc., 2007 U.S. Dist. LEXIS 80878, 2007 WL 3232432, at *6 ("Doubts about whether to transfer or dismiss are usually resolved in favor of transfer because the interest of justice generally is better served by transfer."); *see generally* **[*84]** Wright, Miller & Cooper, 14D Fed. Prac. & Proc. Juris.3d § 3827 (2008). With this presumption in mind, the Southern District of Ohio is a proper venue for all of the claims over which this Court has personal jurisdiction, and this Court has the authority to transfer the case to the Southern District of Ohio *sua sponte* pursuant to 28 U.S.C. § 1406(a). [22] Flynn v. Greg Anthony Constr. Co., Inc., 95 Fed. Appx. 726, 738 (6th Cir. 2003) (unpublished) (noting that both 28 U.S.C. §§ 1404(a) and 1406(a) permit a district court to transfer a case *sua sponte*).

As the Supreme Court explained in the seminal case on § 1406(a), the purpose of the statute is pragmatic:

> The section is . . . in accord with the general purpose which has prompted many of the procedural changes of the past few years-that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were

---

[22] Section 1406(a) states:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 1406(a). ***Section 1404(a)*** governs transfer of properly venued actions for the sake of convenience while § 1406 governs transfer of improperly venued actions. Lyons v. Jameson, No. 08cv11885, 2008 U.S. Dist. LEXIS 72741, 2008 WL 4387092, at *2 (E.D. Mich. Sept. 24, 2008) ("In short, transfer under ***§ 1404(a)*** is from proper district to proper district and transfer under § 1406(a) is from improper **[*85]** district to proper district."). Therefore, technically, ***§ 1404(a)*** applies to the claims properly venued here and § 1406(a) applies to all of the other claims. Practically, "the end result is the same, and very few litigants will care whether the court purports to proceed under ***§ 1404(a)*** or § 1406(a) . . . ." Flynn, 95 Fed. Appx. at 738 n.9. The distinction is meaningful because the Court applies a different standard for transfer under § 1406(a) than the factor-based analysis employed above in the context of a request for transfer under ***§ 1404(a)***.

> **[*86]** intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of § 1406(a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by . . . 'time-consuming and justice-defeating technicalities.'

Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962). Following this rationale, courts apply the language of the statute literally and transfer the case -- either pursuant to a motion or *sua sponte* -- if (1) the transferee district is a proper venue and (2) transfer is "in the interests of justice" based on the particular circumstances of the case. For example, in Martin v. Stokes, 623 F.2d 469, 474 (6th Cir. 1980), the Sixth Circuit stated:

> The law in this Circuit . . . is that § 1406(a) provides the basis for any transfer made for the purpose of avoiding an obstacle to adjudication on the merits in the district court where the action was originally brought.

See also Campbell v. Premier Cruise Lines, Ltd., Inc., 838 F.2d 470 (6th Cir. 2003) (table); Fryer v. Ron Wager & Bantz, Gosch & Cremer, LLC, No. 2:07cv593, 2008 U.S. Dist. LEXIS 65533, 2008 WL 3285913, at *3 (S.D. Ohio Aug. 8, 2008) **[*87]** (citing *Goldlawr*); Delta Media Group, Inc., 2007 U.S. Dist. LEXIS 80878, 2007 WL 3232432, at *6 (stating that "[t]he district court may transfer a case when venue is improper in the original forum if doing so is in the interest of justice" and transferring based on judicial economy, use of the resources, and general efficiency); *see generally* Wright, Miller & Cooper, 14D Fed. Prac. & Proc. Juris.3d § 3827 (2008).

Chief Judge Carr has described the pendent venue doctrine as follows:

> "courts have increasingly recognized the doctrine of "pendent venue", derived from the concept of pendent jurisdiction. *See, e.g.,* Beattie v. United States, 244 U.S. App. D.C. 70, 756 F.2d 91, 101 (D.C.Cir.1984) ("The doctrine of 'pendent venue' is now well established, particularly in cases where the court has previously exercised its discretion to hear a certain claim under pendent jurisdiction."). Under the doctrine of pendent venue, "a federal court may in its discretion hear pendent claims which arise out of the same nucleus of operative fact as a properly venued federal claim, even if venue of the pendent claim otherwise would not lie." Banfield v. UHS Home Attendants, Inc., No. 96 Civ. 4850, 1997 U.S. Dist. LEXIS 8778, 1997 WL 342422, at *2 (S.D.N.Y. June 23, 1997). In making its **[*88]** decision, a court must consider factors such as "judicial economy, convenience to the parties and the court system, avoidance of piecemeal litigation and faimess to the litigants." *Id*. (citing Rodriguez v. Chandler, 641 F.Supp. 1292, 1302 (S.D.N.Y.1986))."

Bertz v. Norfolk S. Ry., No. 3:03cv7011, 2003 U.S. Dist. LEXIS 12672, 2003 WL 21713747, at *1 (N.D. Ohio Jun. 25, 2003) (quoting Hsin Ten Enters. USA, Inc. v. Clark Enters., 138 F. Supp. 2d 449, 462 (S.D.N.Y. 2000)). Although the Sixth Circuit has not expressly adopted the pendent venue doctrine, numerous courts within the Sixth Circuit have applied it as described in Bertz. *See e.g.,* Pearle Vision, Inc. v. N.J. Eyes, Inc., No. 08cv190, 2009 U.S. Dist. LEXIS 281, 2009 WL 73727, at *7 (S.D. Ohio Jan. 9, 2009) (using pendent venue to "avoid piecemeal litigation"); Clayton v. Heartland Res., Inc., No. 08cv94M, 2008 U.S. Dist. LEXIS 97086, 2008 WL 5046806, at *3 (W.D. Ky. Nov. 21, 2008) (finding pendent venue appropriate where state law claims over which district court may properly exercise supplemental jurisdiction arose from the same nucleus of operative facts as the properly venued federal claims); Taylor v. CSX Transp., Inc., No. 3:05cv7383, 2006 U.S. Dist. LEXIS 62204, 2006 WL 2550021 at *5 (N.D. Ohio Aug. 31, 2006) (Zouhary, J.); *see generally* **[*89]** Wright, Miller, & Cooper, 14D Fed. Prac. & Proc. Juris.3d § 3808 (2008).

The Court in *Taylor* aptly described the purpose and standard for pendent venue:

> Generally, venue must be established for each cause of action, Washington v. General Electric Corp., 686 F.Supp. 361, 362 (D.D .C.1988), and for each defendant. New York v. Cyco.net, Inc., 383 F.Supp.2d 526, 543 (S.D.N.Y.2005). "Nevertheless, where venue is proper for some, but not all, claims and where, as here, the claims arise out of the same core of operative facts, plaintiffs may rely on the doctrine of 'pendent venue' to cure any venue defect." Sisso v. Islamic Republic of Iran, 448 F. Supp. 2d 76, 2006 U.S. Dist. LEXIS 59137, *12 (D.D.C. Aug. 23, 2006). As the D.C. Circuit explained:
>
> > "Whether to apply the principle of pendent

> venue in any given case is a discretionary decision, based on applicable policy considerations. Some of these considerations will be the same as those that support the exercise of pendent jurisdiction-judicial economy, convenience, avoidance of piecemeal litigation, and fairness to the litigants. Other considerations unique to the context of venue will apply. For example, the purpose of venue rules is generally considered to **[*90]** be "primarily a matter of convenience of litigants and witnesses." It is also oriented to the convenience of the court system."
>
> *Beattie v. United States, 244 U.S. App. D.C. 70, 756 F.2d 91, 103 (D.C.Cir.1984)*.

*Taylor, 2006 U.S. Dist. LEXIS 62204, 2006 WL 2550021 at *5*.

Here, judicial economy, convenience, avoidance of piecemeal litigation, fairness, and the convenience of the court system favor applying the pendent venue doctrine to Plaintiff's Defamation, Deceptive Business Practices under *O.R.C. § 4165.02(A)(10)*, and Tortious Interference claims. Because the Defendants came to the Southern District of Ohio to conduct a canine dock jumping event, and because this conduct is directly related to their Copyright Infringement, Deceptive Trade Practices, and Unfair Competition claims, the Southern District of Ohio is a proper venue for all of the claims that arise from the Defendants' most significant contacts with the state of Ohio. Therefore, it would be inefficient, inconvenient, and wasteful of resources -- for both the parties and the Court -- to divide this case and try some of the claims in the Northern District of Ohio and some in the Southern District. Refusing to apply the pendent venue doctrine would obviously promote piecemeal litigation. **[*91]** Although the Defamation, Deceptive Business Practices under *O.R.C. § 4165.02(A)(10)*, and Tortious Interference claims are not as focused on the staging of an event in the Southern District of Ohio, the claims arises from the same nucleus of operative facts, i.e., the Defendants' allegedly unlawful attempt to simultaneously capitalize on Plaintiff's ingenuity and undermine its business opportunities, including operative sponsorship agreements, by using unlawful business practices and defamation. It is both manifestly efficient and fair for a single court to handle all of the claims arising from the general course of conduct alleged in the Complaint. The Court thus finds that the pendent venue doctrine applies and, therefore, the Southern District of Ohio is an appropriate venue for all of the claims alleged in the Complaint.

Accordingly, the remaining claims in this case are hereby **TRANSFERRED** to the Southern District of Ohio.

VIII. CONCLUSION

For the foregoing reasons, *Defendants' Motion to Dismiss for Lack of Personal Jurisdiction; Improper Venue or in the Alternative to Transfer Venue* (Doc. 15) is **DENIED in part and GRANTED in part**. Specifically, the motion to dismiss for lack of personal **[*92]** jurisdiction is granted with respect to all claims against Defendant Nguyen, which are hereby **DISMISSED**, and all of the motions are denied with respect to all other claims. **FURTHER**, the remaining claims in this lawsuit are hereby **TRANSFERRED** to the United States District Court for the Southern District of Ohio.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley

KATHLEEN McDONALD O'MALLEY

UNITED STATES DISTRICT JUDGE

Dated: February 13, 2009

End of Document

Kroger Co. v. Merrill

United States District Court for the Northern District of Ohio

July 9, 2009, Decided; July 9, 2009, Filed

CASE NO. 1:09-CV-722

Reporter
2009 U.S. Dist. LEXIS 58254 *; 2009 WL 2059776

KROGER CO., Plaintiff, vs. RANDY MERRILL, et al, Defendants.

Prior History: *Kroger Co. v. Merrill, 2009 U.S. Dist. LEXIS 56841 (N.D. Ohio, June 16, 2009)*

Counsel: **[*1]** For Kroger Co., Plaintiff: Kenneth J. Rubin, Kimberly Weber Herlihy, Vorys, Sater, Seymour & Pease - Columbus, Columbus, OH.

For Randy Merrill, Judy Merrill, James Merrill, Defendants: Grant A. Goodman, Cleveland, OH.

Judges: JAMES S. GWIN, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES S. GWIN

Opinion

ORDER & OPINION

[Resolving Doc. No. 27]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Defendants Randy Merrill, Judy Merrill, and James Merrill ("the Merrills") move this Court to dismiss the complaint due to improper venue or to transfer venue to the Eastern District of Michigan. [Doc. 27.] Plaintiff The Kroger Company ("Kroger") opposes the motion. [Doc. 40.] The Merrills have filed a reply. [Doc. 53.] For the reasons discussed below, this Court **DENIES** the Defendants' motion to dismiss due to improper venue and **DENIES** the Defendants' motion to transfer venue.

I. Background

On March 31, 2009, Plaintiff Kroger sued Defendants Randy Merrill, Judy Merrill, and James Merrill for breach of contract, and unjust enrichment. [Doc. 1.] [1] Kroger is an Ohio corporation with a principal place of business in Ohio, and the Merrills are all citizens of Michigan. [Doc. 1 at 1-2.] The parties' dispute centers upon a contract, a claimed **[*2]** breach of that contract, and the potential responsibility of non-contracting parties for that claimed breach.

In January 2007, Kroger contracted with Pinnacle Construction Management, Inc., ("Pinnacle"), a Michigan business allegedly incorporated by the Merrills, to perform construction work on one of Kroger's Ohio stores. As of February 2008, following legal troubles and at least one adverse judgment, the Merrills closed Pinnacle's operations. Kroger contends that the Merrills then continued operations as A.J. Miles Company, Inc. Kroger seeks to pierce the corporate veil of Pinnacle to support its allegations of fraud against the Merrills.

In the instant motion to dismiss or transfer venue, the Merrills argue that venue is not appropriate in the Northern District of Ohio because all of the Defendants reside in Michigan and a substantial part of the events giving rise to the Plaintiff's claims did not occur in Ohio. [Doc. 27.] The Defendants explain that "all of Plaintiff's claims are dependent upon a piercing the corporate veil theory, and all the events that supposedly give rise **[*3]** to/justify piercing the corporate veil occurred in Michigan." [Id. at 8-9.] These events allegedly include the commingling of funds, forming a successor entity, and making supposed admissions related to these activities. [Id. at 8.] The Defendants contend that nearly all relevant events alleged occurred in Michigan. Even if venue is appropriate in the Northern District of Ohio, the

[1] Kroger subsequently filed an amended complaint, but the claims remain substantively the same. [Doc. 22.]

Defendants argue that the convenience of the parties and witnesses warrants transfer of venue to the Eastern District of Michigan.

In opposing the motion to dismiss or transfer venue, Plaintiff Kroger argues that venue in the Northern District of Ohio is proper because a substantial portion of Kroger's complaint relates to a contract governing work the parties knew would be performed in Ohio. [Doc. 40 at 1.] Arguing that the Court need not consider whether Michigan is a *better* venue than Ohio, Kroger emphasizes the substantial relationship between the claims and this district. [Id. at 5.] The Plaintiff says, "It is undisputed that Pinnacle contracted to do work in Ohio, did work in Ohio, was sued in Ohio (along with Kroger), and defaulted on that suit. Kroger has brought this suit, in part, to recover for **[*4]** the breach of contract related to those events." [Id.] Further, Kroger argues that the Court should not grant a transfer of venue to the Eastern District of Michigan because the Defendants have failed to meet their burden of showing that the balance of factors favors transfer. [Id. at 6.] Kroger contends that it chose this forum, the claim arose in this district, and it will be more convenient for Kroger to litigate the case in this district because it is an Ohio corporation with Ohio attorneys, and many of Kroger's witnesses and all of its documents related to the case are in Ohio. [Id. at 7.]

In their reply, the Merrills further advance the argument that litigating this case in the Eastern District of Michigan will be more convenient for everyone. [Doc. 53.] The Merrills dispute Plaintiff Kroger's characterization that most witnesses and documents are located in Ohio. [Id. at 3.] Again, the Defendants argue that all the activities relevant to the theory of liability -- piercing the corporate veil -- occurred in Michigan. [Id. at 3-4.]

II. Legal Standard

A. Dismissal

When a defendant challenges venue, the plaintiff bears the burden of establishing that venue is proper. *MedQuist MRC, Inc. v. Dayani, 191 F.R.D. 125, 127 (N.D. Ohio 1999)*. **[*5]** In resolving a *Rule 12(b)(3)* motion, a district court can consider materials outside the pleadings, but will generally accept all well-pleaded allegations as true unless the defendant's affidavits contradict those allegations. 5B WRIGHT & MILLER § 1352.

Under *28 U.S.C. § 1406(a)*, if a plaintiff files a case in the wrong venue, the district court "shall dismiss" the case. *28 U.S.C. § 1406(a)*; *see also FED. R. CIV. P. 12(b)(3)*. Under the general venue statute, *28 U.S.C. § 1391(b)*,

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship
>
> may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). In deciding whether a plaintiff's chosen venue is appropriate under *§ 1391(b)*, district courts must decide whether the district **[*6]** has a "substantial connection." *See First of Michigan Corp. v. Bramlet, 141 F.3d 260, 264 (6th Cir. 1998)*. The district court, however, need not compare the connection of its district to the connection of other districts or decide what district has the most substantial connection. *See id*. Generally, "most courts are quite lenient in finding that a substantial part of the events occurs in a district." 14D WRIGHT & MILLER § 3806.1.

B. Transfer

Section 1404(a) states, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *28 U.S.C. § 1404(a)*. When ruling on a motion to transfer pursuant to *28 U.S.C. § 1404(a)*, the Court considers "the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.'" *Moses v. Bus. Card Express, Inc., 929 F.2d 1131, 1137 (6th Cir. 1991)* (quoting *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)*. But, "[I]f venue is proper, a plaintiff's **[*7]** choice of forum is given substantial weight," unless convenience and the interests of justice "strongly favor transfer." 14D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3801.

III. Analysis

A. Dismissal

The Defendants argue that the Northern District of Ohio is not a proper venue for the action under *28 U.S.C. § 1391* because they do not reside in this district and a substantial part of the events giving rise to the claim did not occur in this district. The Merrills base this conclusion on the theory that Kroger seeks to pierce the corporate veil of Pinnacle, and the events justifying the piercing of the corporate veil substantially occurred in Michigan. However, the critical issue in terms of venue is not the theory of liability, but the claims asserted. Venue is proper in a district where a "substantial part of the events or omissions giving rise *to the claim* occurred." *28 U.S.C. § 1391(b)* (emphasis added). All of Kroger's claims -- for declaratory judgment, breach of contract, and unjust enrichment -- stem from a contract for construction work at an Ohio store and attendant litigation. [Doc. 22 at 10-11.] Therefore, a substantial part of the events or omissions **[*8]** giving rise to those contract-related disputes occurred in Ohio, including the Defendants' alleged failure to indemnify Kroger in an action stemming from that contract in an Ohio court. Accordingly, the Northern District of Ohio is a proper venue for the action.

B. Transfer

The Defendants also argue for a transfer of venue to the Eastern District of Michigan for the convenience of "everyone" and because Michigan law will purportedly govern the case. The Defendants fail, however, to demonstrate that the private and public interests "strongly favor" transfer. The Court accords significant weight to a plaintiff's choice of forum when considering a motion to transfer. The Plaintiff chose to file this case in the Northern District of Ohio. Kroger is an Ohio corporation, and operative facts giving rise to Kroger's complaint occurred in Ohio, including the alleged breach of contract regarding the Ohio store. While the Defendants themselves may not be located in Ohio, and their witnesses and documents may not be in Ohio, that is insufficient to merit transfer. Nor would the interests of justice be better served by transferring the case to Michigan. The alleged injury occurred here in Ohio, and **[*9]** the Defendants, through Pinnacle, availed themselves of the privilege of doing business in Ohio. The Court concludes that convenience and the interests of justice do not "strongly favor" transfer, weighed against the Plaintiff's choice of forum. The Court denies the Defendants' motion to transfer venue.

IV. Conclusion

For the foregoing reasons, this Court **DENIES** the Defendants' motion to dismiss for improper venue or to transfer venue. [Doc. 27.]

IT IS SO ORDERED.

Dated: July 9, 2009

/s/ James S. Gwin

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

End of Document

LexisNexis

Marlite, Inc. v. Canas

United States District Court for the Northern District of Ohio, Eastern Division

August 6, 2009, Decided; August 6, 2009, Filed

CASE NO. 5:09CV1401

Reporter
2009 U.S. Dist. LEXIS 130484 *; 2009 WL 7272802

MARLITE, INC., PLAINTIFF, vs. AMERICA CANAS, DEFENDANT.

Subsequent History: Transferred to, Motion granted by, in part, Motion denied by, in part, Costs and fees proceeding at *Marlite, Inc. v. Eckenrod, 2011 U.S. Dist. LEXIS 2268 (S.D. Fla., Jan. 5, 2011)*

Prior History: *Marlite, Inc. v. Canas, 2009 U.S. Dist. LEXIS 130485 (N.D. Ohio, July 22, 2009)*

Counsel: **[*1]** For Marlite, Inc., Plaintiff, Counter-Defendant: Angela M. Lavin, Christopher A. Holecek, Peter A. Hessler, LEAD ATTORNEYS, Wegman, Hessler, & Vanderburg, Cleveland, OH.

For America Canas, Defendant, Counter-Claimant: Harry E. Van Camp, DeWitt, Ross & Stevens, Madison, WI.

Judges: HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE.

Opinion by: SARA LIOI

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court is the motion to dismiss filed by defendant America Canas ("Canas") (Doc. Nos. 24-25, 26) and plaintiff Marlite, Inc.'s ("Marlite") memorandum in opposition (Doc. No. 31). [1] For the reasons set forth below, the motion to dismiss is **DENIED**; however, the Court will **TRANSFER VENUE** to the United States District Court for the Southern District of Florida.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Marlite is an Ohio corporation. It manufactures slatwall and sells it to both distributors and end-users. Marlite has plants in several areas, including Miami, Florida. Canas was employed by Marlite at its Miami facility as a sales manager. As a condition of her employment, Canas signed a Confidentiality and Non-Solicitation Agreement (the **[*2]** "Agreement") with Marlite.

In January of 2009, Canas's sales manager position was affected by a reduction in force made necessary by the current economic conditions. However, because Marlite did not want to lose Canas, it offered her a sales position at a lower salary, but with the possibility of significant sales commissions. Canas accepted the position, but in May of 2009, she resigned. Marlite soon discovered that Canas had taken a job with one of its competitors.

In this action, Marlite alleges that Canas is breaching the Agreement by soliciting Marlite's customers on behalf of her new employer. The Court issued a Preliminary Injunction against Canas on July 22, 2009. (Doc. No. 35.)

Prior to the issuance of the Preliminary Injunction, Canas filed the instant motion to dismiss which is now at issue.

II. DISCUSSION

A. Personal Jurisdiction

In this case, the Agreement contains a provision which states that "[t]he parties [. . .] consent and agree to

[1] Although the Court permitted the filing of a reply brief, no such brief has been filed.

jurisdiction [. . .] for any claim or cause of action arising under or related to this Agreement in the state or federal courts located in or for Tuscarawas County, Ohio." (Doc. No. 23-10, ¶ 13.) Personal jurisdiction, unlike subject matter **[*3]** jurisdiction, [2] is a waivable right and, by signing the Agreement, Canas arguably consented to jurisdiction in this Court, notwithstanding her residence in Florida. [3] However, the Court need not decide whether this particular provision in the Agreement is enforceable because it concludes, as discussed below, that it has personal jurisdiction over Canas with or without that clause in the Agreement.

When a defendant challenges personal jurisdiction, the burden is on the **[*4]** plaintiff to establish the court's jurisdiction by a preponderance of the evidence. *McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)*.

> Presented with a properly supported 12(b)(2) motion and opposition, the court has three procedural alternatives: it may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions. *Serras [v. First Tennessee Bank Nat. Ass'n]*, 875 F.2d [1212], 1214 [(6th Cir. 1989)]. The court has discretion to select which method it will follow, and will only be reversed for abuse of that discretion. *See Michigan Nat. Bank v. Quality Dinette, Inc., 888 F.2d 462, 466 (6th Cir.1989)*; *Serras, 875 F.2d at 1214*. However, the method selected will affect the burden of proof the plaintiff must bear to avoid dismissal. *Serras, 875 F.2d at 1214*.

Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991).

In this case, the Court has not conducted a separate hearing on the motion to dismiss. However, the motion was filed just one day after the Court conducted a preliminary injunction hearing. The transcript of that hearing is available **[*5]** (Doc. No. 36) and, along with the affidavits of the parties, has been relied upon by the Court in ruling on the motion to dismiss.

"To determine whether personal jurisdiction exists over a defendant, federal courts apply the law of the forum state, subject to the limits of the *Due Process Clause of the Fourteenth Amendment*." *Compuserve Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996)*.

> The exercise of personal jurisdiction is valid only if it meets both the state longarm statute and constitutional due process requirements. *See Nationwide Mutual Ins. Co. v. Tryg International Ins. Co., 91 F.3d 790, 793 (6th Cir.1993)* (citing *Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1115 (6th Cir.1994))*. Although the Ohio Supreme Court has ruled that the Ohio long-arm statute does not extend to the constitutional limits of the *Due Process Clause*, our central inquiry is whether minimum contacts are satisfied so as not to offend "traditional notions of fair play and substantial justice." *See Cole v. Mileti, 133 F.3d 433, 436 (6th Cir.1998)* (citing *Goldstein v. Christiansen, 70 Ohio St.3d 232, 1994 Ohio 229, 638 N.E.2d 541, 545 n. 1 (Ohio 1994)* (per curiam)).

Calphalon Corp. v. Rowlette, 228 F.3d 718, 721 (6th Cir. 2000). **[*6]** [4]

---

[2] There is no question that this Court has subject matter jurisdiction under ***28 U.S.C. § 1332***.

[3] Use of a forum selection clause is a common way for contracting parties to agree in advance to submit to the jurisdiction of a particular court. *See generally M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)*. Enforceability of a forum selection clause such as this is a question of law and both Ohio law and federal law treat these clauses similarly. *General Electric Co. v. G. Siempelkamp, 29 F.3d 1095, 1098 n.3 (6th Cir. 1994)*. However, the Court notes that these clauses are typically found in the context of a contract involving two commercial parties engaged in arm's-length transactions, not an individual and her employer.

[4] *Section 2307.382* provides, in relevant part:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> (2) Contracting to supply services or goods in this state;
>
> (3) Causing tortious injury by an act or omission in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
>
> (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods

The minimum contacts test for establishing personal jurisdiction is satisfied either through general or specific jurisdiction. *Conti v. Pneumatic Prods. Corp., 977 F.2d 978, 981 (6th Cir. 1992)*. General jurisdiction is established by a defendant's "continuous and systematic" contacts with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*. Specific jurisdiction, however, subjects the defendant to suit in the forum state only on claims that arise out of or relate to a defendant's contacts with the forum. *Id*.

In *Southern Machine Co. v. Mohasco Industries, Inc. 401 F.2d 374 (6th Cir. 1968)*, the court established a three-part test for determining whether specific jurisdiction **[*8]** exists, which incorporates due process concerns:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Id. at 381.

The purposeful availment requirement is the "sine qua non" for personal jurisdiction. *Id. at 381-82*. It "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or third person[.]" *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (citations omitted). To satisfy the requirement, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)*. "[P]arties who reach out beyond one state and create continuing **[*9]** relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King, 471 U.S. at 473* (quotation and citation omitted).

Once the purposeful availment requirement is satisfied, a plaintiff must show that the cause of action arises from the defendant's activities in the forum state. This "lenient standard" asks whether the cause of action was "made possible by" or "lie[s] in the wake of" the defendant's contacts, or whether the cause of action is "related to" or "connected with" the defendant's contacts with the forum state. *Air Products and Controls, Inc. v. Safetech Intern., Inc., 503 F.3d 544, 553 (6th Cir. 2007)*.

Finally, when considering the last prong of the due process analysis, the Court is to consider several factors, including "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Industry Co. v. Superior Court of Solano Cty., Cal., 480 U.S. 102, 114, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)*. Where the first two prongs of the due process inquiry have been satisfied, the Court will "presume the specific assertion of personal jurisdiction **[*10]** was proper." *Cole, 133 F.3d at 436*.

In her affidavit (Doc. No. 26), Canas asserts that she has resided in Florida during all relevant times (¶ 11), worked for Marlite in Florida (¶ 12), signed the Agreement in Florida (¶ 13), and that all events underlying this action occurred in Florida (¶ 14).

Marlite does not challenge any of Canas's factual assertions but argues in opposition, supported by the affidavit of John Popa (Doc. No. 31-2), that Canas's contacts with Ohio are nonetheless sufficient to support this Court's exercise of personal jurisdiction. Relying on *Kelly Services, Inc. v. Noretto, 495 F. Supp. 2d 645 (E.D. Mich. 2007)*, Marlite points out that Canas voluntarily accepted employment with Marlite knowing

---

> outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of **[*7]** injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
>
> (7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.
>
> (8) Having an interest in, using, or possessing real property in this state;
>
> (9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

that it was headquartered in Ohio. It further argues that Canas reported to various supervisors who worked out of Marlite's Ohio headquarters (Popa Aff. ¶ 8), communicated regularly by telephone and e-mail with Marlite's employees in Ohio (¶ 9), received access to Marlite's confidential business information which was stored on computer databases maintained in Ohio (¶¶ 11-13), and frequently traveled to Marlite's headquarters in Ohio for company meetings (¶ 10).

In *Kelly Servs., Inc., supra*, **[*11]** the court denied a motion to dismiss for lack of personal jurisdiction. There, Noretto, a resident of Oregon, was employed by Kelly Services as a Regional Manager working out of its Portland, Oregon branch office. He was responsible for several counties in Oregon and Washington. Noretto signed a non-competition, non-solicitation, and non-disclosure agreement as a condition of his employment. Noretto voluntarily resigned and then went to work for a competitor of Kelly Services, allegedly soliciting his former clients in violation of the agreement.

When Kelly Services sued Noretto in the U.S. District Court for the Eastern District of Michigan, Noretto moved to dismiss on the basis of lack of personal jurisdiction over him. He argued that he was a resident of Oregon and only came to Michigan on several isolated occasions when required to do so as part of his employment with Kelly Services. In opposition, Kelly Services argued that Noretto

> had access to, and utilized on a regular basis, [its] confidential and proprietary information including information concerning Kelly's business affairs, customer lists, operational procedures, marketing and sales strategies and practices, contractual **[*12]** details for customers, regional customer pricing and profit margins, recruiting plans, and recruiting sources. Additionally, Kelly claim[ed] that Noretto acquired intimate knowledge concerning Kelly's customers' preferences and service needs, and had extensive contact with two of Kelly's largest and most critical accounts.

Kelly Servs., Inc., 495 F.Supp.2d at 649.

The court denied the motion to dismiss, concluding that Noretto had transacted business in Michigan and that he had the "minimum contacts" necessary to avoid offending traditional notions of fair play and substantial justice. In particular, the court found that "[Noretto] purposefully availed himself of the privileges of conducting activities within the forum state when he became employed by a company headquartered in Michigan; entered into a non-compete, non-solicit, and non-disclosure agreement with Kelly; entered into the Agreement containing a Michigan choice of law provision; continuously reported to supervisors working in Michigan; made several trips to Michigan for training purposes, and frequently used information stored on the company's Michigan based servers." *Kelly Servs., Inc., 495 F.Supp.2d at 653*. [5]

The record here shows that Canas had contacts with Ohio very similar to those that Noretto had with Michigan. Therefore, this Court concludes that it has personal jurisdiction over Canas.

B. Venue

Canas also argues that the case should be dismissed on the basis of venue, but her exact argument is not clear. At page one of her motion, Canas "moves the Court for a change of venue on the ground of *forum non conveniens*." However, on page four, she asks the Court to "dismiss this matter for improper venue pursuant to *Federal Rule of Civil Procedure 12(b)(3)*." The common law doctrine of *forum non conveniens* is not the same as "improper venue." *Forum non conveniens* assumes a proper, but inconvenient, forum. *Rule 12(b)(3)* addresses the case where venue is truly improper.

Proper venue in a case involving diversity of citizenship is determined by reference to *28 U.S.C. § 1391(a)*, which provides **[*14]** that such an action may be brought "only in (1) a judicial district where any defendant resides [. . .], (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred [. . .], or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." Under this statute, proper venue for this case would be only in the Southern District of Florida. [6] However, the Court must

---

[5] The court **[*13]** also applied a specific provision of Michigan's long arm statute which provided for limited personal jurisdiction over a person acting as a manager of a corporation having its principal place of business in Michigan. *MCL § 600.705(6)*. There is no similar provision in Ohio's long arm statute. *See*, n.4, *supra*.

[6] In opposition to Canas's motion, Marlite argues, in reliance on *28 U.S.C. 1391(a)(2)*, that the present forum has a substantial connection to Marlite's claims because the "confidential information [sought to be protected] is contained

also take into account the provision in the Agreement, briefly alluded to in the discussion on personal jurisdiction, which states that the parties "consent and agree to jurisdiction and venue for any claim or cause of action arising under or related to this Agreement in the state or federal courts located in or for Tuscarawas County, Ohio." (Doc. No. 23-10, ¶ 13.)

Canas has offered no argument with respect to this provision in the Agreement and the Court perceives no reason to decline its enforcement. Therefore, the Court must conclude that venue is not *improper*, for purposes of dismissal under Rule 12(b)(3) and, to that extent, defendant's motion must be denied. Even so, the analysis does not end there. The mere fact that this Court may be a *proper* venue under the terms of the Agreement (even though not under § 1391), does not mean it is the *best* **[*16]** or *most convenient* venue. That takes the Court back to defendant's assertion of *forum non conveniens*.

Title 28, Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Thus, so long as the Court has personal jurisdiction over the defendant, it has the discretion to transfer the case to a more convenient forum, with or without a motion from either party. *Hoffman v. Blaski, 363 U.S. 335, 343-44, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* (holding that the transferee court must have personal jurisdiction and proper venue over the action before a transfer under § 1404(a) is proper); *see also Pittock v. Otis Elevator Co., 8 F.3d 325, 329 (6th Cir. 1993)*. [7]

> Among the factors to be considered [when deciding whether to transfer venue] are the nature of the suit; the place of the events involved; the relative ease of access to sources of proof; the nature and materiality of testimony to be elicited from witnesses who must be transported; the respective courts' familiarity with applicable law and the condition of their dockets; and the residences of the parties. *See* ***[*17]*** *Shapiro v. Merrill Lynch & Co., 634 F.Supp. 587, 589 (S.D.Ohio 1986)*.

Midwest Motor Supply Co., Inc. v. Kimball, 761 F.Supp. 1316, 1318 (S.D. Ohio 1991).

Even the existence of the forum selection clause in the parties' Agreement does not preclude the transfer of venue. *See id*. (quoting *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* for the proposition that "*[s]ection 1404(a)* directs a district court to take account of factors other than those that bear solely on the parties' private ordering of their affairs").

Nor does the fact that the Agreement is to be construed in light of Ohio law preclude a transfer to Florida. As in *Midwest Motor Supply*, "[t]he present case, an action for breach of a covenant not to compete, does not appear to present any novel or complex issues under Ohio law." *761 F.Supp. at 1319*. "[I]t does not appear that Ohio contract **[*18]** law is so unique that this fact alone should strongly militate against transfer." *Id*.

In opposition to the motion, Marlite asserts that a majority of the witnesses and evidence relating to its confidential information reside in Ohio and that changing venue to Florida would only improperly transfer inconvenience from Canas to Marlite. It makes this argument, however, without identifying any particular witnesses. *See, e.g., Superior Consulting v. Walling, 851 F.Supp. 839, 845 (E.D. Mich. 1994)* (where neither party had named its witnesses or identified documents, "transferring venue to Texas would simply have exchanged the inconvenience of one party for that of the other").

The Court disagrees with Marlite regarding the location of the witnesses. First, from testimony at the preliminary injunction hearing, the Court learned that the witnesses will most likely fall into two groups: employees of Marlite and customers of Marlite. Presumably, Marlite will be

---

in company operating systems and databases which are **[*15]** located in Dover, Ohio; Canas availed herself of employment with Marlite, an entity headquartered in Dover, Ohio; and Canas interacted with her supervisors, human resource personnel, IT personnel and other co-workers who were located in Dover, Ohio." (Doc. No. 31, at 6-7.) These are arguments that go more toward the question of personal jurisdiction rather than venue. Further, § 1391(a)(2) does not refer to a "substantial connection" with this district; it requires that "a substantial part of the events or omissions giving rise to the claim occurred" in this district. That is not so in this case; rather, virtually all of the events giving rise to the claims in this lawsuit occurred in Miami, Florida.

[7] Even if venue were improper, this Court would still have discretion to transfer (as opposed to dismiss) the case under *28 U.S.C. § 1406*, which provides for transfer "in the interest of justice [. . .] to any district or division in which [the case] could have been brought[,]" if the case was filed "in the wrong division or district[.]"

able to compel the attendance of its own employees in either forum, Ohio or Florida, without the need for a subpoena. However, customers of Marlite who are likely to have been solicited by Canas would be located in the areas that Marlite's **[*19]** Miami, Florida plant services, namely, Florida, Georgia, North Carolina, South Carolina, Alabama, Mississippi, Louisiana, the Caribbean, Mexico, Central America and South America. (Tr. of Prelim. Inj. Hrg., at 31-32, Doc. No. 36.) These customers would not be within the subpoena power of this Court (see *Fed.R.Civ.P. 45(c)(3)(A)(ii)*) and, even if they were willing to voluntarily come to Ohio, that would be at great inconvenience to them.

As in *Midwest Supply*,

> Applying the language of *section 1404(a)* and the pertinent case law, the Court finds that the balance tips in favor of transferring this case, somewhat in terms of the convenience of the parties but strongly in terms of the convenience of witnesses. Under the [Agreement] in question defendant's activities as plaintiff's sales representative were confined to certain specified [southern states] [. . .]. Any breach by the defendant of the covenant not to compete would have occurred in [those states], and thus the pertinent witnesses on the breach of contract issue, as well as to the other issues expected to arise in this case, would be located in those jurisdictions. [. . .] Additionally, transferring this case would appear to present **[*20]** little difficulty in terms of applying the pertinent Ohio law which the Court presumes, at this point, is applicable. Although the agreement provides for venue in [Tuscarawas] County, Ohio, and the Court must give some deference to plaintiff's choice of this forum, its home state, the Court nevertheless, for all the reasons stated, concludes that defendant has carried his burden of showing that for the convenience of the parties and witnesses, and in the interest of justice, this matter should be transferred.

761 F.Supp. at 1319-20.

This matter "might have been brought" in the United Stated District Court for the Southern District of Florida and the Court concludes that it should be transferred there.

III. CONCLUSION

For the reasons discussed above, defendant's motion to dismiss (Doc. No. 24) is **DENIED**, but her motion to transfer venue to the United States District Court for the Southern District of Florida is **GRANTED**.

IT IS SO ORDERED.

Dated: August 6, 2009

/s/ Sara Lioi

HONORABLE SARA LIOI

UNITED STATES DISTRICT JUDGE

End of Document

LexisNexis

Rashid v. Communs. Workers of Am.

United States District Court for the Southern District of Ohio, Western Division

May 4, 2005, Decided ; May 4, 2005, Filed

Case No. 3-:04-CV-291

Reporter
2005 U.S. Dist. LEXIS 35534 *; 2005 WL 1038852

ABDUR-RAUF A. RASHID, Plaintiff, -vs- COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, et al., Defendants.

Subsequent History: Summary judgment denied by *Rashid v. Communications Workers of Am., 2005 U.S. Dist. LEXIS 31373 (S.D. Ohio, Nov. 28, 2005)*

Counsel: **[*1]** For Abdur-Rauf A Rashid, Plaintiff: Jeffrey Michael Silverstein, Jeffrey M. Silverstein & Associates - 3, Dayton, OH.

For Communication Workers of America, AFL-CIO, Communication Workers of America Local 4404, Defendants: Theodore E Meckler, CWA District 4 Counsel, Cleveland, OH.

Judges: THOMAS M. ROSE, UNITED STATES DISTRICT JUDGE.

Opinion by: THOMAS M. ROSE

Opinion

ENTRY AND ORDER GRANTING IN PART AND OVERRULING IN PART DEFENDANTS' MOTION TO DISMISS (Doc. # 5) AND GRANTING IN PART AND OVERRULING IN PART DEFENDANTS' MOTION TO STRIKE

This matter arises from the termination of Plaintiff Abdur-Rauf A. Rashid's ("Rashid's") employment at US Airways and its predecessor companies. The Communications Workers of America ("CWA") and CWA Local 4404 (collectively the "Defendants") were Rashid's exclusive collective bargaining representatives to US Airways at all times relevant.

On July 18, 2001, US Airways terminated Rashid's employment. Defendants grieved the termination as being in violation of the collective bargaining agreement (the "CBA"). On April 23, 2003, an arbitration hearing on the grievance was held before a System Board of Adjustment (the "Board") consisting of Margery E. Gootnick, **[*2]** an impartial arbitrator, Ron Rhoderick, US Airways' aribtrator and Vicki Sheffey, the Defendants' arbitrator.

Page number sixteen (16) of the Board's decision (the "June 2003 Decision") awarded Rashid reinstatement to his position as a reservation clerk, with his seniority intact, and stated that Rashid shall not receive any back pay or contractual benefits for the period from his discharge to his reinstatement. Page number eighteen (18) of the decision, sent to Rashid by the Defendants and signed by Vicki Sheffey, states, "CWA concurs in the result; however, it notes that during the Executive Session discussions the Neutral Arbitrator determined that, if when (sic) Mr. Rashid is reinstated to the seniority list, he is on furlough status, he shall be entitled to all furlough pay and benefits afforded full-time employees of his seniority under the Collective Bargaining Agreements. It is with this understanding of the award that CWA concurs."

On October 19, 2001, while Rashid's grievance was pending, US Airways closed its Dayton Reservation Center thereby eliminating Rashid's position. Employees that held the same position as Rashid were offered to transfer to other locations or offered **[*3]** paid furlough benefits. Rashid allegedly relied upon the representations contained in page eighteen (18) of the Board decision and opted for furlough benefits.

US Airways refused to provide furlough benefits to Rashid. On February 18, 2004, another arbitration hearing was held before the Board which consisted of

the same members as the Board that heard Rashid's prior grievance regarding his termination. This second hearing was to determine whether Rashid was entitled to paid furlough benefits because the position that he was to be reinstated into, without back pay, had been eliminated.

On March 27, 2004, the Board issued a decision (the "March 2004 Decision") denying Rashid furlough benefits on the basis that furlough benefits are a contractual benefit and the June 2003 Decision denied Rashid contractual benefits from the date of his discharge through the date of his reinstatement.

The March 2004 Decision states that Board members Margery E. Gootnick and Ron Rhoderick had no recollection of the information identified in page eighteen (18) of the June 2003 Decision being discussed in executive session and found this information to be factually inaccurate. Further, Gootnick and Rhoderick **[*4]** indicated that they saw page eighteen (18) of the June 2003 Decision for the first time at the February 18, 2004, hearing. Page eighteen (18) was undated and attached to the decision following the signature sheet.

Based upon the aforementioned allegations, Rashid has brought a Complaint against the Defendants seeking two claims for relief. The First Claim for Relief is for violation of the Labor Management Relations Disclosure Act (the "LMRDA"), Union Members *Bill of Rights*, *29 U.S.C. § 411*. Rashid's Second Claim for Relief is for violation of the duty of fair representation (the "DFR") that Defendants owe him pursuant to *45 U.S.C. § 151 et seq.* Rashid's Complaint seeks compensatory damages, punitive damages and attorneys' fees and costs.

Now before the Court is the Defendants' Motion To Dismiss and To Strike. (Doc. # 5.) This motion is fully briefed and now ripe for decision. The Defendants seek dismissal of Rashid's Complaint pursuant to *Fed.R.Civ.P. 12(b)(6)* and seek to strike Rashid's Demands for relief pursuant to *Fed.R.Civ.P. 12(f)*. The standard of review **[*5]** will first be set forth followed by an analysis of the motion.

STANDARD OF REVIEW

The purpose of a *Rule 12(b)(6)* motion to dismiss is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. *Mayer v. Mylod, 988 F. 2d 635, 638 (6th Cir. 1993)*(citing *Nishiyama v. Dickson County, Tennessee, 814 F.2d 277, 279 (6th Cir. 1987)*. Put another way, "the purpose of a motion under Federal *Rule 12(b)(6)* is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case." 5B Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1356 (3d ed. 2004).

The test for dismissal under *Fed. R. Civ. P. 12(b)(6)* is a stringent one. "[A] complaint should not be dismissed for failure to state a claim on which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. **[*6]** " *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*(quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. In addition, for purposes of the motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*.

To survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, "a … complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Columbia Natural Resources, Inc. v. Tatum, 58 F. 3d 1101 (6th Cir. 1995)*, *cert. denied, 516 U.S. 1158, 116 S. Ct. 1041, 134 L. Ed. 2d 189 (1996)*. The Court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken, 829 F. 2d 10, 12 (6th Cir. 1987)*. Put another way, bare assertions of legal conclusions are not sufficient. *Lillard v. Shelby County Bd. of Educ., 76 F. 3d 716, 726 (6th Cir. 1996)*. It is only well-pleaded facts which are construed liberally in favor of the **[*7]** party opposing the motion to dismiss. *Id.;* see also Wright & Miller, *supra,* § 1357.

The Defendants also seek dismissal of Rashid's demands based upon *Fed.R.Civ.P. 12(f)*. *Rule 12(f)* provides that, upon proper motion or upon the court's initiative, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The analysis now turns to the Defendants' Motion To Dismiss.

MOTION TO DISMISS

The Defendants seek to dismiss both Claims for Relief as well as Rashid's Demands for relief. Each Claim for

Relief will be addressed followed by the demands.

First Claim for Relief: Violation of the LMRDA

The Defendants seek dismissal of Rashid's First Claim for Relief for failure to state a claim upon which relief can be granted. Rashid responds that he is willing to dismiss this Claim for Relief with prejudice. Therefore, the Defendants Motion To Dismiss Rashid's First Claim for Relief is GRANTED and Rashid's First Claim for Relief for violation of the LMRDA is DISMISSED.

Second Claim for Relief: Violation of the DFR

The Defendants seek dismissal **[*8]** of Rashid's Second Claim for Relief arguing that Rashid does not state a claim upon which relief can be granted. The basis for this argument is that Rashid has failed to allege any breach of contract by the employer and is required to do so. Rashid responds that he is not required to allege a breach of contract by the employer.

The DFR was first recognized by the Supreme Court in a case arising under the Railway Labor Act (the "RLA"). *International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 46, 99 S. Ct. 2121, 60 L. Ed. 2d 698 (1979)*. Because Rashid was employed by an air carrier subject to the RLA, he presumably premises his Second Claim for Relief upon the RLA rather than the Labor Management Relations Act (the "LMRA," *29 U.S.C. § 185*). However, courts have generally applied the same standards to DFR cases brought under both the RLA and the LMRA. *See e.g., Foust, 442 U.S. 42, 99 S. Ct. 2121, 60 L. Ed. 2d 698*; *Sisco v. Consolidated Rail Corp., 732 F.2d 1188 (3rd Cir. 1984)*.

The Supreme Court has long recognized that a labor organization has a statutory DFR. *Breininger v. Sheet Metal Workers International Association Local Union No. 6, 493 U.S. 67, 73, 110 S. Ct. 424, 107 L. Ed. 2d 388 (1989).* **[*9]** The DFR is "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967)*. The DFR is the means of enforcing the principle that, "no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers. *Breininger, 493 U.S. at 79* (citing *Amalgamated Ass'n of St. Elec. Ry. and Motor Coach Emp. of America v. Lockridge, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1962))*. Further, the DFR serves "to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.*

The Defendants here argue that a DFR claim is inextricably intertwined with a breach-of-contract claim against the employer. However, this is not necessarily the law.

The Supreme Court has determined that employees may bring a suit against both their employer and their union for breach of a collective bargaining agreement. *DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 163-65, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983)*. Where **[*10]** a suit is brought against both the employer and the union, it is termed a "hybrid" action. Such a suit comprises two causes of action. *Id.* The suit against the employer is based upon *§ 301 of the LMRA. Id.* The suit against the union is one for breach of the union's DFR. *Id.* "Yet the two claims are inextricably interdependent." *Id.*

The Supreme Court has also determined that a claim for breach of a union's DFR does not require a concomitant claim against the employer for breach of contract. *Breininger, 493 U.S. at 80*. *Breininger* refers to the earliest DFR suits involving claims against the union for breach of the DFR in negotiating a collective bargaining agreement, a context in which no contract is possible. *Id.* The Supreme Court has also determined that, even in a "hybrid" situation, the employee may, if he chooses, sue one defendant and not the other. *DelCostello, 462 U.S. at 165*.

The Sixth Circuit has more recently confirmed that a DFR claim against a union does not require a breach-of-contract claim against the employer. *Pratt v. UAW, Local 1435, 939 F.2d 385, 388 (6th Cir. 1991).* **[*11]** In *Pratt,* the plaintiff realized that he had no claim against his employer under the collective bargaining agreement when his union allegedly failed to properly assist him in resolving difficulties with absences. *Id. at 389*. The Sixth Circuit has also recognized an allegation that the union had misrepresented facts underlying the negotiation of an agreement as actionable without a breach-of-contract claim against the employer. *White v. Anchor Motor Freight, Inc., 899 F.2d 555, 561 (6th Cir. 1990)* (citing *Anderson v. United Paperworkers International Union, 641 F.2d 574, 576 (8th Cir. 1981))*.

In this case, Rashid does not allege that his employer breached the collective bargaining agreement. His allegation is that the Defendants breached their DFR. They allegedly breached their DFR by attaching page

eighteen (18) to the initial decision. "By attaching page eighteen (18) to the initial decision, Defendants acted discriminatorily, arbitrarily, irrationally, and in bad faith by going beyond the scope of their authority and the realm of reasonableness to amend the written decision of the Systems Adjustment Board thereby misleading **[*12]** Plaintiff into believing that he had a right to furlough benefits." (Compl. P24.)

Count Two of Rashid's Complaint states a claim upon which relief may be granted. He states a claim against the Defendants for breach of their DFR in their representations to him regarding the Board's June 2003 Decision. Rashid need not, according to law, and possibly cannot according to the facts, make a claim against his employer. The Defendants' Motion To Dismiss Rashid's Second Claim for Relief is OVERRULED. The analysis next turns to Rashid's Demands.

Compensatory Damages

The Defendants argue that the only allegation that Rashid makes about his alleged injuries is that he suffered a "loss of earnings and benefits and other damages." (Compl. P26.) As such, this demand, according to the Defendants, is insufficient to constitute a claim for legal relief.

In support of this allegation, the Defendants cite *Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973)*. In *Lynch,* the Fifth Circuit was addressing whether an employee was entitled to a jury trial in a complaint that was framed under 1870 civil rights law and sought reinstatement with back pay plus **[*13]** compensatory and punitive damages. However, the Fifth Circuit was not addressing a DFR claim in *Lynch* and did not indicate that reinstatement, back pay, compensatory damages and punitive damages were not appropriate.

Union conduct may support damages against the union if the union's conduct is a "but-for" cause of those damages. *Wood v. International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, Local 406, 807 F. 2d 493, 502 (6th Cir. 1986)*, cert. denied, *483 U.S. 1006, 107 S. Ct. 3232, 97 L. Ed. 2d 738 (1987)*. "Courts have held unions not liable for breaches of their duty of fair representation absent evidence that but for the union's conduct, the employee would not have been injured." *Id.* (quoting *Anderson, 641 F.2d at 580 n.8*).

Rashid's Complaint alleges a loss of earnings and benefits and other damages. It also alleges that the Defendants' conduct regarding the attachment of page eighteen (18) to the Board's June 2003 Decision is a "but-for" cause of these damages. Further, *Fed.R.Civ.P. 8(a)(2)* only requires a short and plain statement of the claim that gives the defendant fair notice of what **[*14]** the plaintiff's claim is and the grounds upon which it rests. *Conley v. Gibson, 355 U.S. 41, 46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. Therefore, Rashid's demand for loss of earnings and benefits and other damages is sufficient and the Defendants' Motion To Strike Rashid's Demand for compensatory damages is OVERRULED.

Punitive Damages

The Defendants argue that Rashid is not entitled to received punitive damages in this case. Rashid responds that he is entitled to punitive damages.

The Sixth Circuit has several times held that punitive damages are not available from a union in DFR actions. *See e.g., Wilson v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 83 F.3d 747, 755 (6th Cir. 1996)*("it is clear that punitive damages are not available against a union for breach of the duty of fair representation), *cert. denied, 519 U.S. 1041, 117 S. Ct. 610, 136 L. Ed. 2d 535 (1996)*; *United Transp. Union, Local 74 v. Conrail, 881 F.2d 282 (6th Cir. 1989)*("punitive damages…are not available in breach of duty of fair representation cases"), *vacated and remanded, 494 U.S. 1051, 110 S. Ct. 1517, 108 L. Ed. 2d 757 (1990)* (vacated **[*15]** and remanded for reasons other than attorneys' fees); *Wood, 807 F.2d 493* ("A court will not award sanctions that are solely punitive against a union"). *Wilson* involved a hybrid claim alleging an employer's breach of a collective bargaining agreement and a union's breach of its DFR. *United Transportation* involved a DFR claim by a local union against a national union regarding the national union's actions in the merger of eight bankrupt railroads into Conrail. In *Wood,* the alleged DFR breach involved the union's actions both apart from and during an arbitration.

Rashid's only argument is that the Sixth Circuit's reasoning "does not make sense when the union engages in actions that would amount to fraud under state law and the analogous state law claim permits recovery of punitive damages." This argument is, however, not well founded. First, the union's actions in *United Transportation* could arguably have been considered fraudulent and the Sixth Circuit found there

that punitive damages were not available. Second, should Rashid have wished to bring a fraud claim pursuant to Ohio law, he presumably could have done so.

In summary, pursuant to Sixth Circuit **[*16]** precedent, Rashid is not entitled to punitive damages for his DFR claim. The Defendants' Motion To Strike Rashid's Demand for punitive damages pursuant to *Rule 12(f)* is GRANTED.

Attorneys' Fees

The Defendants argue that Rashid is not entitled to attorneys' fees in this matter. Rashid responds that he is entitled to attorneys' fees.

"Under the American Rule, unless a contract or a statute expressly authorizes an award of attorneys' fees, 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.'" *Wilson, 83 F.3d at 753* (quoting *Alyeska Pipeline Services Co. V. Wilderness Society, 421 U.S. 240, 247, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)*). "The American Rule's failure to fully compensate an injured party is justified by the rationale that, 'since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.'" *Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226, 1229 (6th Cir. 1984)* **[*17]** (quoting *Fleischmann Distilling Corp. V. Maier Brewing Co., 386 U.S. 714, 718, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967)*), *cert. denied, 469 U.S. 1215, 105 S. Ct. 1191, 84 L. Ed. 2d 337 (1985)*. Further, claims for attorneys' fees are to be examined on a case-by-case basis, *Wood, 807 F.2d at503*, and the Sixth Circuit has identified several exceptions to this rule.

First, attorneys' fees are recoverable as damages against union defendants in cases where the damages arise from a union's breach of the DFR and are for attorneys' fees reasonably incurred in pursuing a claim against the employer for breach of the collective bargaining agreement. *Wilson, 83 F.3d at 753*. Courts have found equitable exceptions to the American Rule identified as the "common benefit or common fund" exception, the "wilful disobedience of a court order" exception and the "bad faith" exception. *Id. at 754* (citing *Alyeska, 421 U.S. at 257-59*).

The "bad faith" exception allows attorney fees in certain exceptional cases where the opposing party has acted in bad faith. *Shimman, 744 F.2d at 1229*. The "bad faith" generally falls into one of three categories: (1) bad faith **[*18]** occurring during the course of the litigation; (2) bad faith in bringing an action or in causing an action to be brought; and (3) bad faith in the acts giving rise to the substantive claim. *Id. at 1230*. However, the Sixth Circuit has held that, "the bad faith exception does not apply where there is no bad faith after the original claim arises" and the bad faith exception does not allow an award of attorneys' fees based only on bad faith in the conduct giving rise to the underlying claim. *Id. at 1232-33*.

In this case, the only argument for attorneys' fees offered by Rashid is a policy argument. Rashid's policy argument is that plaintiffs in DFR cases are typically working class people that have recently endured hardship relating to their employment and do not have the resources to pursue legal action. As a result, this type of people has little incentive to challenge egregious conduct by labor unions. However, it is the "poor" people that the American Rule is designed to protect. If they could be liable for the union's attorneys' fees if they were unsuccessful, they might be discouraged from bringing the lawsuit.

Rashid also cites *Richardson v.* **[*19]** *Communication Workers of America AFL-CIO* for the proposition that the intentional failure of a labor union to discharge its fiduciary duty to nonmember employees represented bad faith and established plaintiff's right to recover attorneys' fees. *530 F.2d 126, 132 (8th Cir. 1976)*, *cert. denied, 429 U.S. 824, 97 S. Ct. 77, 50 L. Ed. 2d 86 (1976)*. However, the Sixth Circuit specifically rejected this proposition in *Shimman.744 F.2d at 1233*.

Rashid's policy argument is not well founded. In addition, Rashid has not set forth facts in his Complaint that support a "bad faith" exception to the American Rule. Also, Rashid has not brought a breach-of-contract claim against his employer which might result in damages against the Defendants in the form of attorneys' fees. Therefore, the Defendants' Motion To Strike Rashid's Demand for attorneys' fees pursuant to *Rule 12(f)* is GRANTED.

SUMMARY

Rashid's First Claim for Relief for violation of the LMRDA is dismissed with prejudice at the request of Rashid and the agreement of the Defendants. Further,

Rashid's Complaint sets forth allegations of a viable claim for violation of the Defendants' DFR. Therefore, the Defendants **[*20]** Motion To Dismiss is GRANTED IN PART and OVERRULED IN PART. Rashid's First Claim for Relief for violation of the LMRDA is dismissed and Rashid's Second Claim for Relief for violation of the DFR remains to be adjudicated.

Rashid is entitled to pursue compensatory damages pursuant to his allegation that he has suffered a loss of earnings and benefits and other damages. Further, pursuant to Sixth Circuit precedent, Rashid is not entitled to punitive damages from the Defendants. He is also not entitled to attorneys' fees at this time. Therefore, the Defendants' Motion To Strike is GRANTED IN PART and OVERRULED IN PART. Rashid's Demand for punitive damages and attorneys' fees is STRUCK. Rashid may seek compensatory damages and is not precluded from seeking attorneys' fees as a result of future actions by the Defendants.

DONE and **ORDERED** in Dayton, Ohio, this Fourth day of May, 2005.

THOMAS M. ROSE

UNITED STATES DISTRICT JUDGE

LexisNexis

Sparks v. Abe May Packing Co.

United States Court of Appeals for the Sixth Circuit

September 14, 1989, Filed

No. 88-4002

Reporter
1989 U.S. App. LEXIS 13918 *; 884 F.2d 1393

DOUGLAS SPARKS, Plaintiff-Appellant, v. ABE MAY PACKING COMPANY; UNITED FOOD AND COMMERCIAL WORKERS DISTRICT UNION 427, Defendant-Appellee

Notice: **[*1]** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, No. 82-01555.

Opinion

BEFORE: KENNEDY, JONES, and WELLFORD, Circuit Judges.

PER CURIAM. Douglas Sparks filed a complaint against his former employer, Abe May Packing Company (the company), and his union, United Food and Commercial Workers District Union 427 (the union). The complaint was Drought under the Labor Management Relations Act (LMRA), specifically § 301 of the Act, *29 U.S.C. § 185*. He charged the company, at least inferentially, with violation of his rights under the collective bargaining agreement (CBA) in effect at the small meat packing plant involved in this controversy. He asserted that after nine years of employment, he was injured at work and that when he returned "ready and able to resume his former job duties" some two months later, **[*2]** he was offered "less important positions" at a rate of pay significantly lower "than what his old job paid." He charged that the defendant union "fabled to pursue the grievance" which he filed against the company for alleged violation of the CBA.

The CBA effective at the time this dispute arose contained an exclusive grievance procedure which required negotiation of grievances between the union and Abe May. If there were no resolution, the union had the discretion to submit the grievance to binding arbitration.

In 1986, the district court granted the company's motion for summary judgment. The district court granted the motion because: (1) plaintiff failed to respond to it; (2) no facts were presented to show that the union acted "arbitrarily, discriminatorily, or in bad faith;" and (3) no facts established that the company did, in fact, breach the CBA. Sparks took no appeal from the judgment for the company.

The union then filed its motion for summary judgment. The only fact in substantial dispute was whether the union representative relayed to Sparks the salary terms of the company's final offer of reinstatement which was equivalent to his former position and rate of pay. Assuming **[*3]** that the union did not relay this information, the court, nevertheless, granted the union's summary judgment motion holding that the facts, as alleged by appellant, were inadequate to show that the union breached its duty of fair representation under § 301.

Sparks has stated a "hybrid" claim under § 301 of the In such a case, the district court must determine whether an employer violated a collective bargaining agreement in cases in which "'the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation." *DelCostello v. Teamsters, 462 U.S. 151, 164 (1982)*.

Under such a theory, the employee may state its claim against either the union, the employer or both. Sparks must show that the union's conduct was arbitrary, perfunctory, discriminatory or in bad faith, and/or that the union's conduct seriously undermined the arbitral process. *Barr v. '* United States Parcel Service, 868 F.2d 36, 43 (2d Cir. 1989) (quoting Vaca v. Sipes, 386 U.S. 171, 190 (1967); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1967)). **[*4]**

The union set out in its brief for summary judgment, following the entry of judgment for the company, that Sparks' grievance was processed and an informal meeting held with the company at which an offer of "work in another capacity" was refused. It set out that a further meeting was held and "Sparks was again offered a job other than his prior job," and again Sparks refused. The union maintained that, "at this same time the offer was made to return Plaintiff to his previous position," and Sparks again assertedly declined. Roy Archer, the union representative, testified in his deposition "I told him [Sparks] that the Company had offered his original position and old pay and the job back. My advise [sic] was to return to work . . . . immediately He refused to go back to work." Archer amplified that Sparks apparently thought the final offer was $ 6 an hour, a rate much less than his former rate, and that Sparks apparently either did not believe him or would not listen to his advice about "old pay" and "the job back."

Sparks stated in a responsive affidavit that he refused to go back because "Archer informed him that Abe May Packing Company would reinstate him to his former position **[*5]** but at a lower rate of pay." In his deposition, Sparks said he could not remember exactly what rate of pay was finally offered but that Archer told him it was $ 6 an hour. [1] There was, then, clearly a factual dispute as to whether Archer advised Sparks that he was offered full reinstatement or not. In order that summary judgment be appropriate, there must be no "genuine issue as to any material fact." Federal Rule of Civil Procedure 56(c).

The district court granted the union's motion for summary judgment holding:

The Court agrees with defendant Union that plaintiff has not shown that the Union acted in a discriminatory or arbitrary manner or in bad faith. The evidence showed that the Union attempted to obtain plaintiff's reinstatement. In fact, plaintiff was offered his old job back three times. At two least of those offers were at a lower rate of pay but even if the third offer was at the old pay rate, without plaintiff's knowledge, it does not prove breach of duty of fair representation. The Union terminated the pursuit of the grievance only after plaintiff refused several settlement **[*6]** offers. Even Mr. Archer's statement to plaintiff that he believed the grievance was ludicrous and a waste of time does not show bad faith. A good faith decision that a grievance lacks merit does not constitute a breach of duty of fair representation because a Union must be allowed to exercise reasonable discretion in representing its members.

The district court correctly cited DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1982), Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), and Vaca v. Sipes, 386 U.S. 171 (1967), for the proposition that the union may be liable for failure to its duty of fair representation when it "in the dispute process acts in a discriminatory, dishonest, arbitrary or perfunctory manner." It noted further, however, citing only a district court case, that "negligence or mistaken judgment is insufficient to amount to a breach of the union's duty."

We have held, however, in wrestling with what constitutes "arbitrary" or "perfunctory" conduct on the part of a union:

that, absent justification or excuse, a union's negligent failure to take a basic and required step, unrelated **[*7]** to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation. *[Ruzicka v. General Motors Corporation, 523 F.2d 306, 310 (6th Cir. 1975) (Ruzicka I)].* . . . In our order denying the petition for rehearing, we observed that "[o]ur opinion in this action speaks to a narrow range of cases in which unexplained union inaction, amounting to arbitrary treatment, has barred an employee from access to an established union-management apparatus for resolving grievances." 528 F.2d at 913. The key to *Ruzicka I,* then, was our holding that "unexplained union inaction" which substantially prejudices a member's grievance could amount to the type of arbitrary conduct which evidences unfair representation.

Ruzicka v. General Motors Corp., 649 F.2d 1207, 1211 (6th Cir. 1981).

At the same time in *Ruzicka II,* above cited, we reiterated that "ordinary negligence, without more,

[1] Sparks claimed to have been making $ 8.31 an hour before he ceased work by reason of injury.

cannot establish a breach of the duty of fair representation," citing many cases from other circuits. *Ruzicka II, 649 F.2d at 1212*. We put it somewhat differently that "arbitrary **[*8]** perfunctory union conduct which exhibits something *more than simple negligence* is a breach of duty of fair representation." *Farmer v. ARA Services Inc., 660 F.2d 1096, 1103 (6th Cir. 1981)* (emphasis added) Again, it was stated in *NLRB v. International Brotherhood of Teamsters, 782 F.2d 46 (6th Cir. 1986)*, that "the union must avoid arbitrary conduct." *Id. at 51* (citing *Ruzicka I, 523 F.2d at 310*) (citing *Vaca v. Sipes, 386 U.S. at 177*)).

The central issue in this case, as we view it, is whether a fair representation claim can be based on the union representative's failure to relay to a member the critical term of a proposed settlement. Having found that there was no evidence of bad faith, the district court was required to determine whether the union's conduct was arbitrary. The district court made no determination that this action, if proven, constituted "arbitrary" conduct on the part of the union. [2]

[*9] An act or failure to act on the part of the union may be egregious (more than just negligent) so as to constitute arbitrary conduct for failure to transmit vital information to the grievant. The breach of duty of fair representation in this context has been held to be an unfair labor practice under the National Labor Relations Act. *NLRB v. Local 282, Teamsters, 740 F.2d 141 (2d Cir. 1984)*. "The union has a duty to inform its membership of management's position . . . ." *Warehouse Union Local 860 v. NLRB, 652 F.2d 1022, 1025 (D.C. Cir. 1981)*.

Accordingly, we must REVERSE and READ this matter for further proceedings consistent with this opinion.

End of Document

---

[2] A breach of duty of fair representation claim can be made, alternatively, if the union is shown to have acted with "hostility, " or "discrimination, " or "in bad faith, " or dishonestly. *See NLRB v. Teamsters, 782 F.2d at 50, 51*.

LexisNexis

Tamarkin Co. v. Chauffeurs

United States District Court for the Northern District of Ohio, Eastern Division

April 8, 2010, Decided; April 8, 2010, Filed

CASE NO. 4:09-CV-2927

Reporter

2010 U.S. Dist. LEXIS 34725 *; 188 L.R.R.M. 2606; 159 Lab. Cas. (CCH) P10,230

THE TAMARKIN COMPANY, Plaintiff, vs. CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 377, et al., Defendants.

Counsel: **[*1]** For Tamarkin Company, Plaintiff, Counter-Defendant: Beth M. Henke, Susan Gromis Flynn, Marcus & Shapira, Pittsburgh, PA; Elly Heller-Toig, PRO HAC VICE, Marcus & Shapira, Pittsburgh, PA; Kenneth B Stark, Littler Mendelson - Cleveland, Cleveland, OH.

For American Arbitration Association, Defendant: Peter R. Silverman, Shumaker, Loop & Kendrick - Toledo, Toledo, OH.

For Marvin J Feldman, Arbitrator, Defendant: Nicholas D. Satullo, Reminger & Reminger, Cleveland, OH.

For Chauffeurs, Teamsters, Warehousemen and Helpers Local Union # 377, Defendant, Counter-Claimant: D. James Petroff, George H. Faulkner, Joseph C. Hoffman, Jr., Faulkner, Muskovitz & Phillips, Cleveland, OH.

Judges: JUDGE HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE.

Opinion by: SARA LIOI

Opinion

EXPEDITED

MEMORANDUM OPINION AND ORDER

This matter involves a labor dispute between Plaintiff The Tamarkin Company ("the Company") and Defendant Local Union No. 377 ("the Union") involving an arbitration award ("the Award") issued on December 23, 2009, in front of Arbitrator Marvin J. Feldman ("the Arbitrator"). Before the Court are the following motions:

(1) The Company's motion to vacate the Award; (Doc. No. 19.)

(2) The Company's motion for summary judgment **[*2]** as to the Union's counterclaim for arbitration fees; for a declaration that the CBA requires that FMCS be used for arbitrator selection in all cases; a declaration that Marvin Feldman was improperly selected by the Union as an arbitrator; a declaration that Feldman's award is invalid as a matter of law; an order of the parties to proceed to arbitration on the Perry grievance before a panel of FMCS arbitrators; an award of attorney's fees; (Doc. No. 30.) and,

(3) The Union's cross-motion to enforce the Award and cross-motion for summary judgment as to its counterclaim for arbitration fees. (Doc. No 31.)

For the following reasons, the Company's motion to vacate the Award is **GRANTED** and the Union's cross-motion to enforce the Award is **DENIED**. The Company's motion for summary judgment as to the Union's counterclaim for arbitration fees is **GRANTED** and the Union's cross-motion for summary judgment as to its counterclaim is **DENIED**. The Company's motion for summary judgment as to declaratory relief and an order compelling arbitration before a panel of FMCS arbitrators is **GRANTED IN PART**. The Company's motion for attorney's fees is **DENIED**.

I. BACKGROUND

The Tamarkin Company is a corporation with **[*3]** its principal place of business in Youngstown, Ohio, and is engaged in the distribution of frozen goods to retail supermarkets. The Union is an Ohio Labor Organization affiliated with, and chartered by, the Teamsters

International with its principal place of business in Youngstown, Ohio. The Company and the Union are parties to a collective bargaining agreement ("the CBA") dated May 7, 2007, and in force between May 11, 2006 and May 13, 2010. (Doc. No. 1-2.) Article XVII of the CBA governs grievance procedures that may arise under the agreement and includes arbitration provisions. Relevant here, paragraph C of article XVII states in relevant part:

> The Company and the Union shall select an arbitrator from a panel of nine (9) Federal Mediation and Conciliation Service ["FMCS"] arbitrators with NAA credentials. Either the Company or the Union may reject the first panel of arbitrators.

Also relevant is paragraph D, which states in relevant part:

> Cases involving discharge shall be processed through AAA expedited arbitration procedure. The parties will obtain an NAA certified arbitrator from the Western Pa and Eastern Ohio area pursuant to the procedures outlined in (C) above on an expedited **[*4]** basis.

In either late October or early November 2009, Union steward Jerry Perry was discharged from his employment with the Company. On November 4, the Union filed a grievance challenging Perry's discharge. The following day, the Union filed with the AAA a demand for an expedited labor arbitration on Perry's behalf. (Doc. No. 1-3.) On November 6, the Company objected to the AAA and requested, based on "consistent past practice," that the AAA refrain from issuing an expedited panel of arbitrators. (Doc. No. 1-4.) After several e-mails between the parties and between the parties and the AAA (Doc. Nos. 1-5, 1-6), the AAA issued a November 10 letter containing a "list of names selected from [AAA's] Panel of Labor Arbitrators [. . .] said Arbitrators are from the National Academy of Arbitrators who are from Eastern Ohio and Western Pennsylvania." (Doc. No. 1-8.) The letter further states, "[p]lease note that if a party does not return the list in the time specified [7 days], all names will be deemed acceptable." (*Id*.)

Thereafter, the Union responded to the AAA with its ranked selections. The Company did not respond with ranked selections, but rather reiterated its position that it did not **[*5]** consent to an expedited arbitration. (Doc. No. 1-9). While the AAA continued its procedural process, Counsel for the parties continued to seek resolution of the matter, albeit unsuccessfully. On December 2, the AAA appointed Defendant Marvin J. Feldman as the arbitrator. (Doc. No. 1-10.) The dispute regarding the selection of the arbitrator continued, now involving Feldman, who wrote in a letter directed to both parties via the AAA, indicating that "[A]rbitrability will be determined at the hearing. If I find at hearing that the contract contains an arbitration clause to satisfy a grievance between the parties, I will proceed to final Award." (Doc. No. 1-11.) The AAA ultimately set an arbitration date of December 22 in front of Arbitrator Feldman. The parties continued to negotiate a resolution, but were unable to agree on a mutually agreeable method to select an arbitrator.

On December 17, the Company filed its Complaint and contemporaneously filed an emergency motion to stay the December 22 arbitration. (Doc. Nos. 1, 2.) The Union filed a motion to dismiss the Company's complaint on December 18. (Doc. No. 5.) On December 21, 2009, this Court issued a memorandum opinion and order denying **[*6]** the Company's emergency motion to stay the arbitration, finding the Court did not have jurisdiction under the Norris-LaGuardia Act to issue an injunctive remedy. (Doc. No. 10 at pp. 8-9.) In that same opinion, this Court denied the Union's motion to dismiss the Company's complaint, finding the question presented by the complaint, whether a grievance is before a proper arbitration forum, to be a question of substantive arbitrability appropriate for judicial resolution. (*Id*. at pp. 4-5.)

On December 22, Feldman conducted the arbitration hearing at the Union Hall. The Company appeared at the hearing solely to renew its objection to the selection of Feldman, and to request that Feldman discontinue the hearing in light of this Court's December 21 opinion. Feldman denied the Company's request and the Company withdrew from the hearing. [1] Feldman then proceeded to conduct the arbitration hearing *ex parte*. On December 24, Feldman issued his decision, a one-page order finding in favor of the Union and awarding

---

[1] There is an indication that Feldman may have requested that the Company submit a brief to him on the issue of his selection. The Court finds that compliance with the request was unnecessary for at least two reasons: (1) Feldman was an original party to this lawsuit and should have been well aware of the arguments the Company was making relative to the selection of the arbitrator pursuant to the terms of the CBA; and (2) While Feldman was a party to this litigation, and prior to the arbitration, this Court determined that the selection of the arbitrator raised a question of substantive arbitrability appropriate for judicial review and that Feldman himself had a conflict of interest in deciding the issue.

reinstatement and back wages and benefits to grievant Perry. (Doc. No. 31-1.) Specific to the contested arbitrability issue of whether he was improperly selected, Feldman addressed the **[*7]** issue as follows, in its entirety: "The arbitrator further finds that he does have jurisdiction under the contract herein." (*Id*.) For his services, Feldman billed the parties $ 3,440, to be evenly split between the parties. The Union paid this fee in its entirety after the Company refused to pay.

After a case management conference, this Court assigned this case to the expedited track. On January 11, 2010, the Company voluntarily dismissed Feldman and the American Arbitration Association **[*8]** from the lawsuit. (Doc. Nos. 24, 25.) Pursuant to the expedited briefing schedule, on February 2, 2010, the Company filed its motion for summary judgment. (Doc. No. 30.) That same day, the Union filed a joint motion to enforce the Award and for summary judgment. (Doc. No. 31.) Both sides filed respective oppositions on February 16, 2010 (Doc. Nos. 34, 35) and thereafter filed respective replies. (Doc. Nos. 39, 40.) Against this backdrop, this matter is ripe for decision.

II. DISCUSSION

The Court will first address the Company's motion to vacate the Award. While the Union styles its own motion as one for confirmation and enforcement of the award in form, in function it is an opposition to the Company's motion to vacate. The discussion of the motion to vacate will necessarily resolve, of course, both motions. If the Union prevails in its opposition to the motion to vacate, the Award will be confirmed and enforced, and if the Company prevails, the Award cannot be confirmed nor enforced, but will be vacated.

A. Motion to Vacate

A court's review of an arbitrator's decision is "one of the narrowest standards of judicial review in all of American jurisprudence." *Lattimer-Stevens v. United Steelworkers of Am., AFL-CIO, 913 F.2d 1166, 1169 (6th Cir. 1990)* **[*9]** (citing *United Steelworkers v. Enterprise Wheel & Car. Corp., 363 U.S. 593, 599, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)*). In 2007, in *Michigan Family Resources, Inc. v. SEIU Local 517M, 475 F.3d 746, 753 (6th Cir. 2007)*, the Sixth Circuit overruled *Cement Divisions, National Gypsum v. United Steelworkers Local 135, 793 F.2d 759 (6th Cir. 1986)* and established a new standard for reviewing arbitration decisions in order to adhere to the *post-Cement Divisions* Supreme Court decisions in *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987)* and *Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001)*.

In *Michigan Family Resources*, the Circuit instructed courts to limit their inquiries as to an arbitrator's decision to the following:

> Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract"? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted **[*10]** even though the arbitrator made "serious," "improvident" or "silly" errors in resolving the merits of the dispute.

Michigan Family Resources, 475 F.3d at 753 (adopting the questions of "procedural aberration" as identified by *Misco* and *Garvey*).

1. Arbitrator Feldman Acted "Outside His Authority" and Resolved a Dispute Not Committed to Arbitration (before Him)

The first question this Court must ask under *Michigan Family Resources* is "[d]id the arbitrator act 'outside his authority' by resolving a dispute not committed to arbitration?" *Id*. At first blush, a literal reading of this question might end the inquiry as to this case with the conclusion that the CBA between the Company and the Union mandates arbitration for grievances over employee discharges as required by Article XVII therein. A close read of *Michigan Family Resources*, however, compels a more protracted inquiry. There, the Court briefly discussed the question of whether the arbitrator acted outside his authority and resolved a dispute not committed to arbitration, a question that was undisputed in the case, by stating:

> And no one disputes that the collective bargaining agreement committed this grievance to arbitration or disputes **[*11]** that this arbitrator was one of the five arbitrators selected by the parties to be eligible to resolve this dispute. The arbitrator, in short, was acting within the scope of his authority.

Id. at 754. Moreover, "federal courts retain authority to ensure that the arbitration award grows out of a

legitimate process: that the collective bargaining agreement commits the dispute at hand to arbitration." *Id. at 752* (citing *Misco's* requirement that the arbitrator act within the scope of his authority). Indeed, as *Misco* explains, in light of the statutory preference in the Labor Management Relations Act for private settlement of labor disputes without governmental intervention, it is "because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than a judge" that the parties must accept the arbitrator's view of the facts and the meaning of the contract. *Misco, 484 U.S. at 37-38*. A award made by an arbitrator that is not "chosen by them," then, cannot be said to "grow[] out of a legitimate process." Therefore, this Court holds that a dispute in which an arbitrator was not properly selected by the parties is one in which the arbitrator "acted 'outside his **[*12]** authority' by resolving a dispute not committed to arbitration" for the purposes of the *Michigan Family Resources* test. *Michigan Family Resources, 475 F.3d at 753*.

As stated above, the CBA between the Company and the Union mandates arbitration for employee discharges. But that does not mean, however, that the CBA committed this dispute to arbitration before this arbitrator. Although the dispute clearly involved an employee discharge, as discussed below, Feldman had no authority to decide the dispute because he was not properly selected under the relevant provisions of the CBA.

Paragraph C of article XVII states, in relevant part:

> The Company and the Union shall select an arbitrator from a panel of nine (9) Federal Mediation and Conciliation Service ["FMCS"] arbitrators with NAA credentials. Either the Company or the Union may reject the first panel of arbitrators.

Also relevant is paragraph D of article XVII, which states in relevant part:

> Cases involving discharge shall be processed through AAA expedited arbitration procedure. The parties will obtain an NAA certified arbitrator from the Western Pa and Eastern Ohio area pursuant to the procedures outlined in (C) above on an expedited basis.

Neither **[*13]** the Company nor the Union contest the fact that Feldman was not selected from a panel of nine FMCS arbitrators with NAA credentials, but was selected from a list of arbitrators promulgated by the AAA. [2] The issue that is central to this dispute is, rather, a pure question of law, namely contract interpretation: in cases of employee discharge, does the CBA require the arbitrator to be selected from a panel of nine FMCS arbitrators with NAA credentials?

a) Paragraph D is Clear and Unambiguous and the Court Cannot and Need Not Resort to Extrinsic Evidence to Determine its Meaning

The resolution of this dispute turns on the parties' disputed interpretation of the words "outlined in (C) above" as found in paragraph D. The Company submits that this phrase is "clear and unambiguous" and requires that the parties select **[*14]** an arbitrator according to the procedures listed in paragraph C, which requires selection from a panel of nine FMCS arbitrators with NAA credentials. The Union asserts that this phrase is ambiguous on its face and thus necessitates "resort to extrinsic evidence such as bargaining history and 'past practice' evidence to understand the parties' intent concerning this technical arbitration procedure language." (Doc. No. 34 at p. 2.) The Union argues that:

> the words "as outlined" were a shorthand way of stating that AAA would follow the general approach used in Section C for regular arbitration when selecting the arbitrator from its own AAA list. That is, AAA would emulate that approach when administering its own list.

(*Id*. at 9 (underlining in original).) Moreover, the Union asserts:

> The parties intended the reference to Section C to mean that it would serve as an "outline" of what the AAA should do in issuing the panel itself. This was just a shorthand way of saying that not all of the procedures in Section C would apply, namely, the use of FMCS for the panel was expressly intended not to apply to AAA expedited arbitrations.

(*Id*. at 4 (underlining in original).) The Court notes with some **[*15]** incredulity that, as to the Union's first argument as to the meaning of the words "as outlined,"

---

[2] The Union submits that Feldman is apparently also an FMCS arbitrator, and that the Company was given an opportunity to reject the first panel of arbitrators promulgated by the AAA, but these facts are wholly irrelevant. The issue remains that the panel of arbitrators from which Feldman was chosen was not a panel of FMCS arbitrators with NAA credentials, as required by the CBA.

that the term "as outlined" does not appear in paragraph D. The term used in the CBA states "[. . .] pursuant to the procedures outlined in (C) [. . .]."

The enforcement and interpretation of collective bargaining agreements under Section 301 is governed by substantive federal law, *Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957)*, but the Sixth Circuit has held courts should apply traditional rules for contractual interpretation so long as their application is consistent with federal labor policies. *UAW v. Yard-Man, Inc., 716 F.2d 1476, 1479 (6th Cir. 1983)*. To determine the parties' intent as to the procedures utilized to select an arbitrator to hear an employee discharge grievance, the Court first looks to explicit contractual language, but will resort to extrinsic evidence if the language of the labor agreements is ambiguous. *UAW v. BVR Liquidating, 190 F.3d 768, 772, 774 (6th Cir. 1999)*. Ambiguous language is "subject to two reasonable interpretations." *Wulf v. Quantum Chem. Corp., 26 F.3d 1368, 1376 (6th Cir. 1994)*. "[E]xtrinsic evidence, however, *cannot be considered* **[*16]** when contract language is unambiguous." *Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 593 (6th Cir. 2006)* (emphasis added). While the Supreme Court has stated that "words in a collective bargaining agreement [. . .] are to be understood only by reference to the background which gave rise to their inclusion," *United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 570, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960)*, the Sixth Circuit has held "that this language from the *Steelworkers* case does not demand consideration of bargaining history and other extrinsic evidence when the contract is clear and unambiguous." *International Union UAW Local 91 v. Park-Ohio Industries, Inc., 876 F.2d 894 (6th Cir. 1989)*.

A contract is ambiguous when it is susceptible to two or more reasonable interpretations, each of which is consistent with the contract language. *Sec'y of USAF v. Commemorative Air Force, 585 F.3d 895, 900 (6th Cir. 2009)*. When both parties offer "plausible interpretations of the agreement drawn from the contractual language itself, [this] demonstrates that the provision is ambiguous." *Int'l Union UAW Local 91 v. Park-Ohio Industries, Inc., 876 F.2d 894 (6th Cir. 1989)*. It is a well-established principle of **[*17]** contract interpretation that a court should not read an ambiguity into a contract where none exists. *Commemorative Air Force, 585 F.3d at 900* (citing *Babinski v. Am. Family Ins. Group, 569 F.3d 349, 352 (8th Cir. 2009)*).

The Court holds that Article XVII, paragraph D, of the CBA is not ambiguous. The sentence in dispute, "[T]he parties will obtain a NAA certified arbitrator from the Western Pa and Eastern Ohio area pursuant to the procedures outlined in (C) above on an expedited basis" is only susceptible to one reasonable interpretation. The Union's interpretation, which would mandate some provisions of paragraph C to be followed while simply ignoring others, is simply not plausible. To interpret the phrase "pursuant to the procedures outlined in (C) above" as providing a "shorthand way of saying [that some but] not all of the procedures in Section C would apply" borders on frivolous.

Moreover, the Union's argument that the AAA would "follow the general approach used in Section C for regular arbitration when selecting the arbitrator from its own AAA list" is inconsistent with the text of paragraph D. (Doc. No. 34 at p. 9.) Paragraph D does not require the AAA to select "the arbitrator **[*18]** from its own AAA list," as the Union suggests, but rather requires *the parties to obtain* an arbitrator to hear an employee discharge grievance. This requires an affirmative action on part of the parties to acquire, or procure, an arbitrator, to hear the grievance. Paragraph D also clearly specifies how the parties are to obtain the arbitrator, namely, "pursuant to the procedures outlined in (C) above" and dictates that the obtaining of an arbitrator shall be "on an expedited basis." The inclusion of the words "on an expedited basis" in the sentence from paragraph D relating to arbitrator selection also weighs against the Union's argument that the "AAA would generate the list and use Section C as a general approach to administering the arbitrator selection process." (Doc. No. 40 at p. 7.) If the parties intended the AAA to generate the list and administer the arbitration selection process according to their "expedited arbitration procedure," there would be no reason to mandate that "parties will obtain" an arbitrator "on an expedited basis." Indeed, if the Union were correct, the parties would not need "to obtain" an arbitrator, nor would they need to act on "an expedited basis," because **[*19]** both of these requirements would be subsumed by the AAA expedited arbitration procedure. But both requirements appear in the plain text of paragraph D, and the Court must accord them meaning.

Nor can the effect of any asserted "past practice" concerning arbitrations of employee discharge grievances under this or a predecessor CBA affect this

analysis. [3] "[P]ast practice or custom should not be used to interpret or give meaning to a provision or clause of the collective bargaining agreement that is clear and unambiguous." *Beacon Journal Publ'g Co. v. Akron Newspaper Guild, 114 F.3d 596, 601 (6th Cir. 1997)*. *See also* *Edwards v. UPS, 99 Fed. Appx. 658, 660 (6th Cir. 2004)* ("Past practice or custom cannot trump clear and unambiguous terms of a CBA."); *OmniSource Corp. v. USW, Local 9130, No. 98-3603, 1999 U.S. App. LEXIS 17970 at *2 (6th Cir. July 23, 1999)* (holding that where the CBA's terms are clear, the court must enforce those terms even where the company engaged in a contrary practice for a number of years).

The **[*20]** Union has not offered a plausible interpretation of Article XVII drawn from the contractual language itself. Its proffered interpretation is unreasonable on its face. The plain language of the contract is not ambiguous and is susceptible to only one reasonable meaning. Therefore, no inquiry into extrinsic evidence is necessary, or permitted. *Yolton, 435 F.3d at 593*.

b) The Company Has Not Failed to Exhaust its Administrative Remedies

The Union also argues that the Company has failed to exhaust its administrative remedies and has therefore "simply foreclosed its opportunity to contest this matter." This argument is wholly unavailing. The Union cites *Toyota of Berkeley v. Auto. Salesmen's Union, Local 1095, 834 F.2d 751 (9th Cir. 1987)*, for the proposition that the Company's failure to participate in the *ex parte* arbitration hearing before Feldman forecloses its opportunity to contest the award. In *Toyota of Berkeley*, the employer moved to vacate an award made at an *ex parte* hearing it refused to attend on the basis that the timeliness of the grievance and demand for arbitration was not arbitrable. There, the court noted that "the dispute over the timeliness of the Fontes grievance **[*21]** was arbitrable" as "timeliness is a *procedural* question subject to arbitration." *Id. at 754*. Moreover, in *Toyota of Berkeley*, the union and the company "did agree on an arbitrator," and the company had "showed every intention to participate over a period of nearly three years." *Id*. In this case, the Company and the Union did not agree on Feldman as an arbitrator, the Company repeatedly objected to arbitration before Feldman, and appeared at the hearing to specifically preserve its objection to the proceedings.

Nor does *Int'l Brotherhood of Teamsters, Chauffeurs v. Dean Foods Co., No. 91-6259, 1992 U.S. App. LEXIS 16875 (6th Cir. July 14, 1992)*, also cited by the Union, compel a different conclusion. In *Dean Foods*, an unpublished decision, the court affirmed the dismissal of a union's action for breach of a collective bargaining agreement because the union failed to exhaust its contractual remedies. There, the dispute arose "out of an objection to the procedures employed in the resolution of [the underlying dispute]," namely the composition of an arbitration panel. *Id. at *9*. The court in *Dean* found the panel "acted pursuant to the authority vested in it by the [agreement]; whether the **[*22]** composition of the [panel] failed to satisfy the requirements of the [agreement] clearly turns on an interpretation of that agreement" and that the union, by failing to submit the issue, a *procedural issue* relating to the composition of a panel that the union conceded had authority to arbitrate disputes between the parties, to arbitration, failed to exhaust its available contractual remedies by seeking resolution through the courts rather than through arbitration.

Here, of course, and unlike *Dean Foods*, Feldman had no authority to arbitrate this dispute between the parties. The Company never acquiesced to Feldman's improper selection and objected to his appointment multiple times. The Company appeared at the hearing to specifically object to Feldman's appointment and reiterate its contention that Feldman had no authority to hear the dispute. "A party may not be forced to arbitrate any dispute that it has not, by contract, obligated itself to arbitrate." *USW v. Mead Corp., 21 F.3d 128, 131 (6th Cir. 1994)*. Contrary to the Union's suggestion, the Company has not failed to exhaust its administrative remedies and has, rather, repeatedly refused to arbitrate a dispute before an improperly **[*23]** selected arbitrator acting outside his authority.

c) The Company Has Not Waived Its Objection to Feldman's Selection

The Union next argues that the Company waived any objection it might have had to Feldman's selection. The Court disagrees.

As recited above, the Company initially objected to the arbitration on the basis that "consistent past practice" had effectively modified the arbitration agreement so as to not require the use of expedited procedures. (Doc. No. 1-4). The Company continued to object on this basis

[3] The Company appears to recognize this fact and has abandoned its argument that the Perry grievance was not subject to handling on an expedited basis based on past practices.

when it informed the AAA, in writing, that it would "not be selecting from the information [the list of AAA arbitrators] you provided." (Doc. No. 1-9.) The Union contends that the Company "did not even communicate its desire for an FMCS panel before Feldman's appointment, depriving the Union of any opportunity to even address the issue, if any" and that the Company therefore "waived all of its objections." (Doc. No. 31 at p. 15.)

"A party may waive its objection to the jurisdiction of the arbitrators by acquiescing in the arbitration with knowledge of the possible defect." *Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843, 846 (6th Cir. 2003)*. In support of its argument **[*24]** that the Company has waived its objection to Feldman's jurisdiction, the Union cites *Brook v. Peak Int'l, Ltd., 294 F.3d 668 (5th Cir. 2002)*, for the proposition that where the "AAA wrongly provided list of fifteen arbitrators instead of nine and used wrong method of selection [. . .], the failure to object at the time on that basis constituted a waiver." (Doc. No. 31.) The Union misstates the holding of *Brook*, and even a cursory read of that case reveals it to be of no help to the Union in this case.

Brook involved arbitration over severance benefits, administered by the AAA pursuant to an employment agreement. "To state that the AAA failed to follow the simple selection procedure outlined in Brook's Employment Agreement is insufficient: the AAA flouted the prescribed procedures and ignored complaints from both sides about the irregular selection process." *Id. at 673*. The court also noted the uncontroversial principle that, because "arbitration remains an adversarial event, [. . .] parties must insist upon the enforcement of their contractual rights before the arbitrators as they do in court." *Id*. In *Brook*, the plaintiff "never objected to the AAA's failure to follow the selection **[*25]** process in the Employment Agreement (until prompted by the federal magistrate judge long after the arbitration had run its course)."

The court in *Brook* held that, although the plaintiff had objected to the AAA's failure to follow its own selection rules, "he also condoned the AAA ignoring the Employment Agreement [. . .]." *Id*. The plaintiff had "fail[ed] to object to the error in the selection process before [the improperly selected arbitrator] during the arbitration proceedings." *Id*. Nor had the plaintiff "sought an order from the district court compelling arbitration before a properly selected arbitrator pursuant to sections 4 and 5 of the FAA." *Id*. Contrary to the Union's assertion that the plaintiff in *Brook* waived his objection to an improperly selected arbitrator by not objecting "at that time on that basis," *Brook* stands for the "well settled [proposition] that a party may not sit idle through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse." *Id*. (citing *Marino v. Writers Guild of Am., E., Inc., 992 F.2d 1480, 1484 (9th Cir. 1993)*).

Turning to the facts of this case, *Brook* **[*26]** is simply inapposite. Here, the Company never acquiesced in the arbitration before Feldman. Indeed, as the Union concedes, counsel for the Company appeared at the hearing "to object to the Arbitrator presiding." (Doc. No. 31 at p. 4.) Moreover, and unlike *Brook*, in this case the Company *did* seek relief from this Court prior to the arbitration, and the complaint specifically identifies the Company's contention that Feldman was not selected pursuant to the terms of the CBA. (Doc. No. 1 at PP 11, 19-22.)

The Sixth Circuit has held "[t]he party claiming waiver carries the burden of proof." *Nationwide, 330 F.3d at 846*. In this case, the Company repeatedly objected to Feldman's appointment as arbitrator, sought (albeit unsuccessfully due to jurisdictional limitations contained in the Norris-LaGuardia Act) pre-arbitration injunctive relief from this Court based specifically on the ground that Feldman was improperly selected pursuant to the CBA, and appeared at the arbitration hearing to *again* object specifically to Feldman's appointment. The Court concludes, therefore, that the Union has failed, and failed miserably, to meet its burden of proving the Company waived its objection to Feldman's **[*27]** selection.

Returning to the issue of Feldman's selection under the CBA, it is clear (and undisputed) that he was not selected pursuant to the procedures listed in paragraph C of Article XVII, because he was not selected from a panel of nine FMCS arbitrators with NAA credentials, as the clear and unambiguous language of Article XVII requires. Therefore, Feldman was not properly selected by the parties and "acted 'outside his authority' by resolving a dispute not committed to arbitration." *Michigan Family Resources, 475 F.3d at 753*. Having reached the conclusion that the arbitrator acted outside his authority and resolved a dispute not committed to arbitration, this Court need not address the remaining questions posed by *Michigan Family Resources*. [4] The

[4] This Court notes, however, that asking an arbitrator to pass judgment on the propriety of his own selection under a CBA

Company's Motion to Vacate the Award is **GRANTED**. The Union's cross-motion to confirm and enforce the Award is **DENIED**.

A. Motion for Summary Judgment

Federal Rule of Civil Procedure 56(c)(2) governs summary judgment motions and provides:

> The judgment sought should be rendered if **[*28]** the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.
>
> When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or pleadings; rather, its response must--by affidavits or as otherwise provided by this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

However, the movant is not required **[*29]** to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989), *citing* Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034, 274 U.S. App. D.C. 340 (D.C. Cir. 1988). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. Fulson v. Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving **[*30]** party to show that there is some metaphysical doubt as to material facts. *Id*.

1. The Company has no Duty to Pay Feldman's Fee

The material facts relevant to Feldman's fee are not in dispute. The Union has paid Feldman's fee in its entirety, and the Company has refused to reimburse the Union for the one-half of the fee that the Union asserts it owes. The Union now seeks a judgment forcing the Company to pay for an unauthorized arbitration that it did not request, participate in, and in fact protested at every opportunity. In its counterclaim, the Union asserts that the Company is obligated under the CBA and AAA rules "to pay half of the arbitrator's bill for this case and any further charges." (Doc. No. 23, P 100.) The Union does not point to any provision of the CBA, however, and the Company cannot be held responsible for payment of the fee under AAA rules when the Company correctly refused to participate in an unauthorized arbitration. Therefore, the Union's motion for summary judgment as to its counterclaim for Feldman's fee is **DENIED**; the Company's motion for summary judgment as to the Union's counterclaim is **GRANTED**.

2. Declaratory Relief to the Limited Extent of the Perry Grievance

"Even **[*31]** in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement." Misco, 484 U.S. at 41. This Court expressly declines to reach any decision as to the merits of Perry's grievance or the

---

raises serious conflict of interest issues.

application of the CBA to future disputes. This Court, rather, and consistent with *Misco*, is "simply vacat[ing] the award," and "leaving open the possibility of further proceedings if they are permitted under the terms of the agreement." *Id*. To the extent that parties seek to arbitrate the Perry grievance, however, they are directed to select an arbitrator in conformance with Article XVII (C) of the CBA, and consistent with this Court's opinion. To this limited extent, the Company's request **[*32]** for declaratory relief is **GRANTED**.

3. The LMRA does not Authorize Attorney's Fees Absent Bad Faith

Section 301 of the Labor Management Relations Act does not authorize an award of attorney's fees as an element of damages. *Knollwood Cemetery Ass'n v. United Steelworkers of America, 789 F.2d 367, 369 (6th Cir. 1986)*. "Under the American Rule it is well established that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Summit Valley Indus. v. United Bhd. of Carpenters & Joiners, 456 U.S. 717, 721, 102 S. Ct. 2112, 72 L. Ed. 2d 511 (1982)* (internal quotations and citations omitted). While *Summit Valley* left open the possibility of a court using its equitable powers to make exceptions to the American Rule to award fees "where necessary to further the interests of justice," the Court finds exercising those powers would be inappropriate in this case, particularly since the Company has made no substantial attempt to justify its claim for fees. Therefore, the Company's motion for attorney's fees is **DENIED**.

II. CONCLUSION

For the foregoing reasons, the Company's motion to vacate the Award is **GRANTED**. The Union's cross-motion to enforce the Award is **DENIED**. The **[*33]** Company's motion for summary judgment as to the Union's counterclaim for payment of the arbitration fee is **GRANTED** and the Union's cross-motion for summary judgment as its counterclaim is **DENIED**. The Company's motion for summary judgment as to declaratory relief and an order compelling arbitration before an FMCS arbitrator is **GRANTED IN PART**, and the Company's motion for attorney's fees is **DENIED**.

IT IS SO ORDERED.

Dated: April 8, 2010

/s/ Honorable Sara Lioi

HONORABLE SARA LIOI

UNITED STATES DISTRICT JUDGE

End of Document

Veteran Payment Sys., LLC v. Gossage

United States District Court for the Northern District of Ohio, Eastern Division

February 10, 2015, Decided; February 10, 2015, Filed

CASE NO. 5:14CV981

Reporter
2015 U.S. Dist. LEXIS 16261 *; 2015 WL 545764

VETERAN PAYMENT SYSTEMS, LLC, PLAINTIFF, v. TIMOTHY A. GOSSAGE, et al., DEFENDANTS.

Subsequent History: Transferred to, Magistrate's recommendation at *Veteran Payment Sys., LLC v. Gossage, 2015 U.S. Dist. LEXIS 113530 (M.D.N.C., Aug. 27, 2015)*

Counsel: **[*1]** For Veteran Payment Systems, LLC, Plaintiff: Gregory J. Rufo, Canton, OH; Jeffery L. Parrish, Louisville, KY.

Timothy A. Gossage, Defendant, Pro se, Greensboro, NC.

For Mainstream Merchant Services, Inc., Defendant: Richard D. Schuster, Vorys, Sater, Seymour & Pease - Columbus, Columbus, OH; Thomas R. Crookes, Vorys, Sater, Seymour & Pease - Akron, Akron, OH.

Judges: HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE.

Opinion by: SARA LIOI

Opinion

MEMORANDUM OPINION AND ORDER

On March 28, 2014, plaintiff Veteran Payment Systems, LLC ("plaintiff" or "Veteran") filed the above-captioned action in the Stark County Court of Common Pleas against defendants, Timothy A. Gossage ("Gossage") and Mainstream Merchant Services, Inc. ("Mainstream"). (Doc. No. 1-1 ["Compl."].) All of plaintiff's claims relate, in one way or another, to the restrictive covenant Gossage purportedly became subject to during his employment with Veteran. Mainstream removed the action to this Court, on diversity grounds, on May 6, 2014.

The parties have filed a series of motions that are currently before the Court: (1) Mainstream's motion to dismiss for lack of personal jurisdiction (Doc. No. 4 ["Mainstream's Mot."]); (2) Gossage's motion to dismiss for **[*2]** want of personal jurisdiction (Doc. No. 8 ["Gossage's Mot."]); and (3) Veteran's motion to transfer venue (Doc. No. 13 ["Veteran's Mot."]). Veteran has filed an opposition brief to each defendant's motion (Doc. No. 9 ["Veteran's Opp'n to Mainstream's Mot."]; Doc. No. 12 ["Veteran's Opp'n to Gossage's Mot."]), and Mainstream has filed a reply. (Doc. No. 10 ["Mainstream's Reply"].) Additionally, Mainstream has responded to Veteran's motion (Doc. No. 14 [Mainstream's Resp. to Veteran's Mot."]).

I. BACKGROUND

Veteran "is a Delaware limited liability company with its business office . . . in Alliance, Stark County, Ohio[]" and is "in the business of providing credit card processing services for merchants." (Compl. P 2.) Mainstream is "a foreign corporation with its principal office" in Alpharetta, Georgia and is also "in the business of providing merchants with services to process credit card transactions." (*Id*. P 4.) Gossage is a private citizen and "a resident of North Carolina[.]" (*Id*. P 3.)

According to the complaint, on April 26, 2011, Gossage "entered into an Area Manager Employment Agreement" with Veteran that governed various aspects of Gossage's employment and the treatment of Veteran's confidential **[*3]** information. (*Id*. P 7, Ex. 1 ["employment agreement"].) The employment agreement provided, in part, that, for a period of three years after the termination of his employment, Gossage was not to divert any business from Veteran "with any customer with whom Gossage had contact while employed by" Veteran, and that, for a period of two

years after his separation, he was not to solicit any of Veteran's customers. (*Id*. P 10.)

Particularly relevant to the pending motions, the employment agreement contained a forum selection clause that provided:

> **Interpretation and Jurisdiction**. This Agreement shall be exclusively governed by and construed according to the laws of the State of Ohio. The parties agree that any action or proceeding, whether in law or in equity, brought under this Agreement or for a cause of action arising under this Agreement, shall only be brought in the appropriate state or federal courts of the County of Alliance, Ohio, which courts shall have exclusive jurisdiction to hear such matters. The parties waive, to the fullest extent they may do so, the defense of forum non conveniens.

(Employment agreement at 37, bolding in original.)[1]

Veteran "terminated Gossage from employment 'for cause' by on or about June 5, 2013 based upon Gossage's failure and refusal after request" to return to Veteran certain confidential information. (Compl. PP 11-12.) Veteran now claims that, "[s]ince the termination of his employment, Gossage had breached" the employment agreement by "failing to protect and by using" Veteran's confidential information "to pursue self-serving business relationships" with Veteran's merchants, "failing and refusing to return" to Veteran its confidential information, and by "soliciting and diverting [Veteran's] customers with whom Gossage had contact with while employed by" Veteran. (*Id*. P 13.) With respect to Mainstream, Gossage's new employer, Veteran alleges that it "intentionally and wrongfully employed Gossage and participated with Gossage to solicit and divert [Veteran's] merchants for the self-serving purpose to deprive [Veteran] of a contractual right to a revenue stream" that would have flowed from the processing of these merchants' credit card transactions. (*Id*. PP 14, 36.) Veteran raises claims for breach of contract (restrictive covenant) against Gossage, and wrongful interference **[*5]** with contract (willful misconduct) and unjust enrichment against Mainstream. Veteran also seeks an accounting, disgorgement of profits from Mainstream, and injunctive relief.

Mainstream has moved to dismiss the complaint, maintaining that this Court lacks personal jurisdiction over it. While acknowledging some "limited contacts with Ohio" and the servicing of "a limited number of accounts in Ohio," Mainstream underscores the fact that "plaintiff's claims do not arise out of those contacts." (Mainstream's Mot. at 75.) It further argues that the forum selection clause, contained in Gossage's employment agreement, cannot be used to manufacture jurisdiction against it, a non-party to the agreement. (Mainstream's Reply at 243-45.) According to Mainstream, "the only connection this case has to the State of Ohio is the fact that Gossage was previously employed by plaintiff, an Ohio company, and it is convenient for Veteran to litigate here." (Mainstream's Mot. at 73.)

Pro se defendant Gossage has also moved to dismiss on personal jurisdiction grounds. Gossage acknowledges the existence of the forum selection clause in the employment agreement, but he discounts it, explaining that he "do[es] not recall **[*6]** having any understanding of this clause when [he] signed the contract. In reading it now, [he] do[es] not understand that clause to be an agreement on [his] part that the courts in Ohio will have personal jurisdiction over [him]." (Doc. No. 8-1 [Gossage Decl.] at 202.) In a sworn affidavit appended to his motion, Gossage also avers, in part, that he is "not able financially to defend this lawsuit in Ohio based on the expense of travel alone." (*Id.)*

In response to Gossage's dispositive motion, Veteran filed a motion, pursuant to *28 U.S.C. § 1404(a)*, to transfer this action to the United States District Court for the Middle District of North Carolina—Greensboro. It is Veteran's position that Gossage's complaints regarding the expense and inconvenience of defending an action in this judicial district "sound as a motion to dismiss or transfer for *forum non conveniens*." (Veteran's Mot. at 354, italics in original.) Veteran insists that a *§ 1404(a)* transfer to the district court in Greensboro, North Carolina will resolve Gossage's concerns about the inconvenience of litigating this matter so far from home, while providing a forum where personal jurisdiction clearly exists as to Mainstream. (*Id*. at 356-60.)

"Mainstream does not oppose a **[*7]** transfer of venue, but for reasons different than set forth" by Veteran. (Mainstream's Resp. to Veteran's Mot. at 378.) Because it believes that this Court cannot exercise personal jurisdiction over it, Mainstream argues that *§ 1404(a)* cannot be used to effectuate the transfer. Instead, Mainstream suggests that the Court must look to *28 U.S.C. §§ 1406(a)* or *1631*. (*Id*. at 379.) Thus, the

---

[1] All page numbers are to the page identification number generated **[*4]** by the Court's electronic docketing system.

parties agree that a transfer is advisable, but simply disagree as to the proper statutory vehicle.

II. ANALYSIS

The authority to transfer venue lies in *28 U.S.C. §§ 1404(a)* and *1406(a)*. *Section 1404(a)* permits a transfer to any district where the case could have been brought originally for "the convenience of parties and witnesses" and in the "interest of justice[.]" *Section 1406(a)* also enables a district court to transfer venue "in the interest of justice" when venue is improper in the original forum to "any district or division in which it could have been brought." While a transfer under *§ 1404(a)* may not be granted when a court lacks jurisdiction over a defendant, *Pittock v. Otis Elevator Co., 8 F.3d 325, 329 (6th Cir. 1993)* (citing *Martin v. Stokes, 623 F.2d 469, 474 (6th Cir. 1980)*), *§ 1406(a)* does not require a district court to have personal jurisdiction over the defendants before transferring the case. *See Flynn v. Greg Anthony Constr. Co., Inc., 95 F. App'x 726, 739 (6th Cir. 2003)*; *Martin v. Stokes, 623 F.2d 469, 471 (6th Cir. 1980)*; *see, e.g., Goldlawr, Inc. v. Heiman, 369 U.S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962)*.

"Thus, the existence of personal jurisdiction over a defendant, or lack thereof, determines the proper **[*8]** statute under which a court may grant a transfer of venue." *Global Crossing Telecomm., Inc. v. World Connection Grp, Inc., 287 F. Supp. 2d 760, 764 (E.D. Mich. 2003)*. Consequently, the Court must ascertain whether it can exercise jurisdiction over defendants before it can determine whether transfer is appropriate. *See Leroy v. Great W. United Corp., 443 U.S. 173, 180, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979)* ("The question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum."); *see generally Martin, 623 F.2d at 474* ("The law in this Circuit, therefore, is that *§ 1406(a)* provides the basis for any transfer made for the purpose of avoiding an obstacle to adjudication on the merits in the district court where the action was originally brought. That defect may be either improper venue or lack of personal jurisdiction. This construction of *§ 1406(a)* necessarily limits the application of *§ 1404(a)* to the transfer of actions commenced in a district court where both personal jurisdiction and venue are proper."); *see, e.g., Costaras v. NBC Universal, Inc., 409 F. Supp. 2d 897 (N.D. Ohio 2005)* (addressing personal jurisdiction before venue).

A. **Personal Jurisdiction over Defendants**

The *Due Process Clause* requires that the non-resident defendant have such sufficient minimum contracts with the forum state that "finding personal jurisdiction does not offend traditional notions of **[*9]** fair play and substantial justice." *Conn v. Zakharov. 667 F.3d 705, 712 (6th Cir. 2012)* (quotation marks and citations omitted). Two kinds of personal jurisdiction nestle under the *Due Process clause*: general jurisdiction and specific jurisdiction. *Id. at 718* (citations omitted). As explained below, only specific jurisdiction—wherein plaintiff's claims arise out of or relate to a defendant's contacts with the forum state—is at issue in this case.

Because this is a diversity case, personal jurisdiction will be ultimately established by state law. *Welsh v. Gibbs, 631 F.2d 436, 439 (6th Cir. 1980)*, *cert. denied*, *450 U.S. 981, 101 S. Ct. 1517, 67 L. Ed. 2d 816 (1981)*. In Ohio, personal jurisdiction may be established by minimum contacts with the state as defined in *Ohio Rev. Code § 2307.382*, the state's long arm statute, which states, in pertinent part, as follows:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> (2) Contracting to supply services or goods in this state;
>
> (3) Causing tortious injury by any act or omission in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business . . . in this state;
>
> (5) Causing injury in this state to any person by breach of warranty expressly **[*10]** or impliedly made in the sale of goods outside this state . . .
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons . . .
>
> (7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state. . .
>
> (8) Having an interest in, using, or possessing real property in this state;
>
> (9) Contracting to insure any person, property, or risk located within this state at the time of contracting.
>
> ***
>
> (C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

Ohio Rev. Code § 2307.382; Pittock, 8 F.3d at 327.

1. Defendant Gossage

As a resident of North Carolina, Gossage insists that this Court cannot exercise personal jurisdiction over him, underscoring the following facts: (1) that he has not performed any services for plaintiff or Mainstream in the State of Ohio, (2) that he has not "solicited or sold a single merchant account in the State of Ohio[,]" (3) that he signed his employment contract with plaintiff in North Carolina, (4) that he has never maintained a residence or telephone number or owned property in Ohio, and (5) that **[*11]** he has never conducted any business in Ohio. (Gossage Decl. at 201-02.) Plaintiff does not seriously dispute the limited nature of Gossage's contacts with the State of Ohio, and, instead, relies primarily upon the forum selection clause in Gossage's employment agreement.

"Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). "[T]here are a variety of legal arrangements whereby litigants may consent to the personal jurisdiction of a particular court system. The use of a forum selection clause is one way in which contracting parties may agree in advance to submit to the jurisdiction of a particular court." Preferred Capital, Inc. v. Assocs. in Urology, 453 F.3d 718, 721 (6th Cir. 2006) (quotation marks and citations omitted); *see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (personal jurisdiction requirement may be waived through forum selection clause in contract); Kennecorp Mortg. Brokers, Inc. v. Country Club Convalescent Hosp., Inc., 66 Ohio St. 3d 173, 1993 Ohio 203, 610 N.E.2d 987, 989 (Ohio 1993).

"Federal courts hold that forum selection clauses that have been freely bargained for are *prima facie* valid and enforceable." Diebold, Inc. v. Firstcard Fin. Servs., Inc., 104 F. Supp. 2d 758, 763 (N.D. Ohio 2000) (citation omitted). Even in the employment setting, where the parties may not have equal bargaining power and the employee may not be a sophisticated business person, courts have enforced such clauses absent fraud or manifest injustice. *See, **[*12]** e.g.*, Shingler v. Smile Care, LLC, No. 1:14CV725, 2014 U.S. Dist. LEXIS 97181, 2014 WL 3543800 (N.D. Ohio July 17, 2014) (enforcing forum selection clause in employment agreement); *but see* Buckeye Check Cashing of Ariz., Inc. v. Lang, No. 2:06-CV-792, 2007 U.S. Dist. LEXIS 12746, 2007 WL 641824 (S.D. Ohio Feb. 23, 2007) (declining to enforce a forum selection clause in an employment contract where employee was not informed of clause until after forced to resign former job and re-apply for new position). As such, "[a] forum selection clause should be upheld absent a strong showing that it should be set aside." Wong v. PartyGaming Ltd., 589 F.3d 821, 828 (6th Cir. 2009) (citation omitted).

In *Wong*, the Sixth Circuit identified the following factors to be considered in evaluating the enforceability of a forum selection clause:

> whether the clause was obtained by fraud, duress, or other unconscionable means; whether the designated forum would ineffectively or unfairly handle the suit; and whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust.

Id. (numerals and citations omitted). Gossage has failed to even suggest, let alone establish, that the clause was the result of fraud, duress, or other unconscionable means, or that this Court would unfairly adjudicate this action.

The third factor requires a showing **[*13]** that "enforcement of the clause would be so inconvenient . . . that its enforcement would be unjust or unreasonable." Wong, 589 F.3d at 829 (citing Assocs. of Urology, 453 F.3d at 722-23). "This finding must be based on more than mere inconvenience of the party seeking to avoid the clause." *Id*. Gossage bears the burden of demonstrating that it would be unreasonable or unjust to enforce the forum selection clause. Buckeye Check Cashing of Ariz., 2007 U.S. Dist. LEXIS 12746, 2007 WL 641824, at *7 (citation omitted). Such a showing requires a demonstration that "enforcement of the clause would be 'manifestly and gravely inconvenient' to the party seeking to avoid enforcement such that it will 'effectively be deprived of a meaningful day in court[.]'" *Id*. (citations omitted).

Gossage insists that he is "nearly bankrupt" and does not have the funds to litigate this action so far from his home. He also suggests that it is unfair for him to have to do so when his only connection to Ohio—aside from the forum selection clause he acknowledges that he signed—is that his former employer maintains its headquarters in Ohio. (Gossage Decl. at 202.) This representation falls short. "Mere distance, mere expense, or mere hardship to an individual litigant is

insufficient to invalidate a forum selection clause." *Buckeye Check Cashing of Ariz., 2007 U.S. Dist. LEXIS 12746, 2007 WL 641824, at *7* (citations omitted); *see Estate of Thomas v. CIMSA Ingenieria de Sistemas, No. 5:11CV1960, 2012 U.S. Dist. LEXIS 154116, 2012 WL 5335277, at *4 (N.D. Ohio Oct. 26, 2012)* **[*14]** (citation omitted). Moreover, the Court finds Gossage's self-serving statement that he did not understand the plainly worded language in the clause insufficient to overcome the *prima facie* validity of the clause. Accordingly, the Court concludes that Gossage has, via a valid and enforceable forum selection clause, waived the requirement that the Court have personal jurisdiction over him.[2]

2. Defendant Mainstream

It is Veteran's position that this Court can exercise personal jurisdiction over Mainstream because it is an unlicensed corporation doing business in Ohio. Alternatively, Veteran posits that the forum selection clause contained in Gossage's employment agreement, which Veteran notes was executed in Ohio and purportedly is the basis for its claims against both defendants, supplies the Court with the necessary jurisdiction over Mainstream. Neither argument has merit.

While Mainstream concedes that it "has a small number of accounts in Ohio," which it estimates represent less than two percent of its accounts portfolio and less than one percent of its net income, it is undisputed that none of the Ohio accounts previously belonged to Veteran or were procured for Mainstream by Gossage. (Mainstream's Mot. at 72 [citing Doc. No. 4-2, Vignale Decl. at 80]; *see* Gossage Decl. at 201.) Ohio law does not permit the exercise of general jurisdiction. *Conn, 667 F.3d at 717-18* ("under Ohio law, a court may exercise personal jurisdiction over a non-resident defendant only if specific jurisdiction can be found under one of the enumerated bases in Ohio's long-arm statute"); **[*16]** *Am. Energy Corp. v. Am. Energy Partners, Case No. 2:13-cv-886, 2014 U.S. Dist. LEXIS 64524, 2014 WL 1908290, at *5 (S.D. Ohio May 9, 2014)*; *Puronics, Inc. v. Clean Resources, Inc., No. 5:12-CV-01053, 2013 U.S. Dist. LEXIS 5414, 2013 WL 149882, at *4, n.3 (N.D. Ohio Jan. 14, 2013)*. Therefore, these contacts that are unrelated to plaintiff's claims cannot support a finding of personal jurisdiction.

Additionally, the alleged fact that Mainstream may be an unregistered foreign corporation doing business in Ohio cannot supply the necessary personal jurisdiction. It is true that an unlicensed foreign corporation doing business in the State of Ohio may not maintain an action in Ohio until it has obtained a license. *Ohio Rev. Code § 1703.29(A)*. There is nothing in the Ohio statute, however, that provides that the failure of a foreign corporation to obtain a license to do business in the state will subject the business to the jurisdiction of the Ohio courts. Moreover, Ohio's long arm statute does not include failure to be licensed in Ohio as a basis for the exercise of personal jurisdiction. *See Ohio Rev. Code § 2307.382(A)*.

Plaintiff also, however, looks to the forum selection clause in Gossage's employment agreement to satisfy specific jurisdiction over Mainstream, arguing that "[i]t is the foregoing contract entered into with Veteran in Ohio that gives rise to Veteran's claims against Mainstream." (Veteran's **[*17]** Opp'n. to Mainstream's Mot. at 208.) Mainstream resists this argument, underscoring the fact that it was not a signatory to the agreement, and cannot, therefore, be held to its terms.

There is support in the law for non-parties to be bound by forum selection clauses contained in contracts. Specifically, a non-signatory to a forum selection clause may be bound if the non-signatory is "closely related" to the contracting parties or dispute, such that it was "'foreseeable' that it will be bound[.]" *Baker v. LeBoeuf, Lamb, Leiby & Macrae, 105 F.3d 1102, 1106 (6th Cir. 1997)* (citation omitted). Plaintiff argues that Gossage is Mainstream's agent, and, as such, Mainstream has a sufficiently close relationship to the contracting parties and dispute such that it was foreseeable that it would be haled into court in Ohio. (Veteran's Opp'n. to Mainstream's Mot. at 215-16.)

Courts within the Sixth Circuit have focused on different considerations in evaluating the "closely related"

---

[2] In so ruling, the Court observes that the forum selection clause incorrectly states that actions on the employment agreement may be brought in "appropriate State or federal courts of the County of Alliance, Ohio." (*See* employment agreement at 37.) There is no such county in Ohio. Alliance is, however, a city in Stark County, Ohio, the county in which this action was original brought. (*See* Notice of Removal, Doc. No. 1.) Defendants did not raise the issue of whether this error invalidates the forum selection clause and the argument is, therefore, waived. Even if this Court were to find that the forum selection clause was unenforceable and, additionally, that this Court did not have personal jurisdiction over Gossage, the Court could and would **[*15]** transfer Gossage's claims under *§ 1406(a)*.

requirement for enforcement of a forum selection clause against non-signatories. Some courts have looked to whether the non-signatory directly benefited from the agreement. *See* ThorWorks Indus. v. E.I. DuPont de Nemours and Co., 606 F. Supp. 2d 691, 697 (N.D. Ohio 2008) (finding that licensing agent was not bound by a forum selection clause between licensee and licensor where agent did **[*18]** not benefit from agreement). Other courts have focused on the legal relationship between the parties and the non-signatory, considering whether the non-signatory was an agent, corporate officer, subcontractor, or guarantor of a contracting party. *See* Hitachi Med. Sys. Am., Inc. v. St. Louis Gynecology & Oncology, LLC, No. 5:09-CV-2613, 2011 U.S. Dist. LEXIS 17022, 2011 WL 711568, at *11 (N.D. Ohio Feb. 22, 2011) (non-party to service maintenance agreement was not bound by the agreement's forum selection clause where non-signatory did not stand in an agency relationship with either party to the agreement); Highway Commercial Servs., Inc. v. Zitis, No. 2:07-CV-1252, 2008 U.S. Dist. LEXIS 32487, 2008 WL 1809117, at *4-5 (S.D. Ohio Apr. 21, 2008) (finding no agency or other intimate relationship binding non-party to lease agreement's forum selection clause); *but see* H.H. Franchising Sys., Inc. v. Klaits, No. 1:12CV709, 2014 U.S. Dist. LEXIS 43494, 2014 WL 1308505, at *2 (S.D. Ohio Mar. 31, 2014) (holding that company was not bound by a forum selection clause in a franchise agreement that it did not sign, even though the agreement was signed by its sole member in his individual capacity).

Ultimately, however, the analysis comes down to whether the non-signatory should have reasonably foreseen that it might be required to defend an action in a court in Ohio. As one district court explained:

> In sum, it is clear from [a review of relevant **[*19]** cases] that courts considering this question of whether a non-signatory may be bound by a forum selection clause take a common sense, totality of the circumstances approach that essentially inquiries into whether, in light of those circumstances, it is fair and reasonable to bind a non-party to the forum selection clause. . . [T]his approach places emphasis on whether it should have been reasonably foreseeable to the non-signatory that situations might arise in which the non-signatory would become involved in the relevant contract dispute.

Regions Bank v. Wyndham Hotel Mgmt., Inc., No. 3:09-1054, 2010 U.S. Dist. LEXIS 23371, 2010 WL 908753, at *6 (M.D. Tenn. Mar. 11, 2010) (assignee was closely related to parties to a hotel management agreement so as to be bound by the agreement's forum selection clause).

Applying a common sense, totality of the circumstances approach to the present situation, the Court finds that Mainstream should not be bound by the forum selection clause. Mainstream employed Gossage, a North Carolina resident, to acquire accounts in North Carolina. Mainstream was likely aware of Gossage's prior employment with Veteran, an Ohio-based corporation. It is undisputed, however, that Gossage did not solicit business in Ohio on behalf of Veteran. Thus, **[*20]** while Mainstream "likely knew it was risking just this sort of litigation with an Ohio company when it hired him[,]" it could not have reasonably foreseen that this litigation would necessarily take place in Ohio or that it would be bound by the forum selection clause in its new employee's contract with a former employer. *See, e.g.,* FirstMerit Corp. v. Craves, No. 1:14-CV-02203, 2015 U.S. Dist. LEXIS 3743, 2015 WL 151318, at *2 (N.D. Ohio Jan. 12, 2015) (forum selection clause in employment agreement was not enforceable as against subsequent employer). The Court concludes that Mainstream is not bound by the forum selection clause, and that there is no basis upon which this Court can exercise personal jurisdiction over Mainstream.

B. **Transfer Under *28 U.S.C. §§ 1404(a)* and *1406(a)***

Because the Court finds that defendant Gossage is subject to *in personam* jurisdiction in Ohio but defendant Mainstream is not, the Court must utilize *28 U.S.C. § 1404(a)* to consider the parties' request to transfer the claims against Gossage and *28 U.S.C. § 1406(a)* to consider the request to transfer the claims against Mainstream. *See, e.g.,* J4 Promotions, Inc. v. Splash Dogs, LLC, No. 08 CV 977, 2009 U.S. Dist. LEXIS 11023, 2009 WL 385611, at *27 n.22 (N.D. Ohio Feb. 13, 2009) (applying *§ 1404(a)* to properly venued claims and *§ 1406(a)* for all other claims); Brink v. Ecologic, Inc., 987 F. Supp. 958 (E.D. Mich. 1997) (transferring certain claims under *§ 1404(a)* and others under *§ 1406(a)*).

1. *Transfer of the Claims against Gossage under § 1404(a)*

Under the *§ 1404(a)* analysis, the Court must **[*21]** determine whether the action could have been brought in the proposed venue, which requires a showing that: (1) the proposed transferee court would have subject

matter jurisdiction over the case; (2) venue would be proper in the proposed district; and (3) the defendants must be subject to personal jurisdiction there. *Travelers Cas. & Sur. Co. v. Phila. Reins. Corp., No. 3:01CV7058, 2001 U.S. Dist. LEXIS 10913, 2001 WL 631328, at *5 (N.D. Ohio May 10, 2001)*. Like this Court, the Middle District of North Carolina would have subject matter jurisdiction over the case because Veteran is from a different state than both defendants, and Veteran has alleged damages of no less than $105,287.05. Thus, complete diversity of the parties and damages in excess of the threshold amount would support the North Carolina district court's exercise of diversity jurisdiction. *See 28 U.S.C. § 1332(a)*.

Section 1391(b)(2) provides that a civil action may be brought in "a judicial district in which a substantial part of the events giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated[.]" *28 U.S.C. § 1391(b)(2)*. The parties agree that Mainstream hired Gossage, a resident of North Carolina, to offer credit card transaction services to be performed for merchants located in North Carolina. **[*22]** Accordingly, venue would be proper in the Middle District of North Carolina, and the action could have originally been brought in this alternative district.

The Court must next consider and weigh certain public and private interests. *Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531, 537-38 (6th Cir. 2002)*. "Private factors include: the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling witnesses; the cost for obtaining attendance of willing witnesses; the possibility of inspecting the premises, if appropriate; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Sirak v. J.P. Morgan Chase & Co., No. 5:08CV169, 2008 U.S. Dist. LEXIS 94328, 2008 WL 4845950, at *2 (N.D. Ohio Nov. 5, 2008)* (citing *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947))* (numerals omitted). "Public interest factors include: administrative difficulties of courts with congested dockets; the burden of jury duty on members of a community with no connection to the litigation; the local interest of having localized controversies decided at home; and the appropriateness of having diversity cases tried in a forum which is familiar with the governing law." *Id*. (citing *Gulf Oil Corp., 330 U.S. at 508*) (numerals omitted). No one factor is dispositive; rather transfer is appropriate if the balance of these factors weighs "strongly" in favor of transfer. **[*23]** *Picker Int'l, Inc. v. Travelers Indem. Co., 35 F. Supp. 2d 570, 573 (N.D. Ohio 1998)*. "A Court need not extensively discuss each of the [aforementioned] factors, but should instead focus its analysis on those factors that are particularly relevant to a given transfer determination." *Krawec v. Allegany Co-Op Ins. Co., No. 1:08-CV-2124, 2009 U.S. Dist. LEXIS 57792, 2009 WL 1974413, at *4 (N.D. Ohio July 7, 2009)* (citations omitted).

A balance of the relevant factors favors transfer. There appears to be no dispute that Gossage, and most of the merchants he is alleged to have solicited on behalf of Mainstream, are located in North Carolina. (Mainstream's Mot. at 75; Vignale Decl. at 80; Gossage Decl. at 201; Veteran's Mot. at 354.) Because most of the material witnesses and the relevant financial documents that will constitute the bulk of the evidence in this case are located in North Carolina, consideration of the private factors dictates that a North Carolina trial would be comparatively easy, expeditious, and inexpensive. Additionally, because most of the underlying credit card transactions, for which Veteran believes that it was entitled to a processing fee, took place in North Carolina, most of the public factors would also favor a transfer. (Veteran's Mot. at 354.) While the North Carolina district court may be called upon to apply the law of Ohio **[*24]** to this action, that factor alone is not dispositive, and the transferee court is just as capable as this Court of applying the relevant state law to the present dispute. *See Cincinnati Ins. Co. v. O'Leary Paint Co., Inc., 676 F. Supp. 2d 623, 638 (W.D. Mich. 2009)* (noting that "in the absence of any legal issues which seem complex, the necessity for either [federal] court to apply another State's law would not be a weighty factor" in the *§ 1404(a)* analysis) (collecting cases). Thus, the *§ 1404(a)* analysis leads to the conclusion that the interest of justice supports a transfer of Veteran's claims against Gossage.

2. *Transfer of the Claims against Mainstream under § 1406(a)*

The same result is reached under *§ 1406(a)* with respect to Veteran's claims against Mainstream. *See Eagle Mining, LLC v. Elkland Holdings, LLC, Civil No. 14-105-ART, 2014 U.S. Dist. LEXIS 95590, 2014 WL 3508017, at *2 (E.D. Ky. July 14, 2014)* ("A court must balance similar considerations [as under *§ 1404(a)*] when deciding whether to transfer a case pursuant to *§ 1406(a)*, and has broad discretion when doing so.") (citing *Stanifer v. Brannan, 564 F.3d 455, 456-57 (6th Cir. 2009))*. As previously observed, most of the underlying business transactions occurred in North

Carolina, one of the defendants resides in North Carolina, and many of the material witnesses and financial records are located in North Carolina. It is also possible that some of these witnesses may be outside of this Court's subpoena **[*25]** power. Under these circumstances, the interest of justice is served by a transfer to North Carolina.[3]

III. CONCLUSION

For all of the foregoing reasons, the Court shall grant Veteran's unopposed motion to transfer. Veteran's claims against Gossage shall be transferred pursuant to *28 U.S.C. § 1404(a)*, and Veteran's claims against Mainstream shall be transferred pursuant to *28 U.S.C. § 1406(a)*. Defendants' motions to dismiss for want of personal jurisdiction will be denied as moot. This action is hereby ordered transferred to the United States District Court for the Middle District of North Carolina—Greensboro.

IT IS SO ORDERED.

Dated: February 10, 2015

/s/ Sara Lioi

HONORABLE SARA LIOI

UNITED STATES DISTRICT JUDGE

End of Document

[3] *Section 1631* also supports a transfer of these claims. It provides that when the court "finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought[.]" *28 U.S.C. § 1631*. The Sixth Circuit has observed that *§§ 1406(a)* and *1631* are "similar provision[s]" that "confer broad discretion in ruling on a motion to transfer." *Stanifer, 564 F.3d at 456-57*.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE TAMARKIN COMPANY,	)	CASE NO. 4:09-CV-2927
	)	
	)	
Plaintiff,	)	JUDGE SARA LIOI
	)	
vs.	)	
	)	
CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 377, et al.,	)	MEMORANDUM OPINION AND ORDER
	)	
	)	
Defendants.	)	

This matter is before the Court on Plaintiff The Tamarkin Company's ("the Company") emergency motion to stay arbitration. (Doc. No. 2) In response, Defendant Local Union No. 377 ("the Union") filed a motion to dismiss the Company's complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. No. 5). The Union also filed a motion for expedited discovery pursuant to Rule 26(d). For the reasons that follow, the Company's emergency motion to stay arbitration is **DENIED** and the Union's motion to dismiss is **DENIED**. The Court declines to rule on the Union's motion for expedited discovery at this time, and will discuss this motion at the Case Management Conference.

I. BACKGROUND

The Tamarkin Company is a corporation with its principal place of business in Youngstown, Ohio, and is engaged in the distribution of frozen goods to retail supermarkets. The Union is an Ohio Labor Organization affiliated with, and chartered by, the Teamsters

EXHIBIT 2

International with its principal place of business in Youngstown, Ohio.[1] The Company and the Union are parties to a collective bargaining agreement ("the CBA") dated May 7, 2007, and in force between May 11, 2006 and May 13, 2010. (Doc. No. 1-2.) Article XVII of the CBA governs grievance procedures that may arise under the agreement and includes arbitration provisions. Relevant here, paragraph C of article XVII states in relevant part:

> The Company and the Union shall select an arbitrator from a panel of nine (9) Federal Mediation and Conciliation Service ["FMCS"] arbitrators with NAA credentials. Either the Company or the Union may reject the first panel of arbitrators.

Also relevant is paragraph D, which states in relevant part:

> Cases involving discharge shall be processed through AAA expedited arbitration procedure. The parties will obtain an NAA certified arbitrator from the Western Pa and Eastern Ohio area pursuant to the procedures outlined in (C) above on an expedited basis.

In either late October or early November 2009, Union steward Jerry Perry was discharged from his employment with the Company. On November 4, the Union filed a grievance challenging Perry's discharge. The following day, the Union filed with the AAA a demand for an expedited labor arbitration on Perry's behalf. (Doc. No. 1-3.) On November 6, the Company objected to the AAA and requested, based on "consistent past practice," that the AAA refrain from issuing an expedited panel of arbitrators. (Doc. No. 1-4.) After several e-mails between the parties and between the parties and the AAA (Doc. Nos. 1-5, 1-6), the AAA issued a November 10 letter containing a "list of names selected from [AAA's] Panel of Labor Arbitrators [. . .] said Arbitrators are from the National Academy of Arbitrators who are from Eastern Ohio and Western Pennsylvania." (Doc. No. 1-8.) The letter further states, "[p]lease note

[1] The Company's complaint also names the American Arbitration Association and the arbitrator assigned by the AAA to this matter, Attorney Martin J. Feldman, as defendants. The Company and the Union, however, are the real parties in interest to this dispute and the participation of the AAA and Feldman is not required for the resolution of this matter.

that if a party does not return the list in the time specified [7 days], all names will be deemed acceptable." (*Id.*)

Thereafter, the Union responded to the AAA with its ranked selections. The Company did not respond with ranked selections, but rather reiterated its position that it did not consent to an expedited arbitration. (Doc. No. 1-9). While the AAA continued its procedural process, Counsel for the parties continued to seek resolution of the matter, albeit unsuccessfully. On December 2, the AAA appointed Defendant Marvin J. Feldman as the arbitrator. (Doc. No. 1-10.) The dispute regarding the selection of the arbitrator continued, now involving Feldman, who wrote in a letter directed to both parties via the AAA, "[A]rbitrability will be determined at the hearing. If I find at hearing that the contract contains an arbitration clause to satisfy a grievance between the parties, I will proceed to final Award." (Doc. No. 1-11.) The AAA ultimately set an arbitration date of December 22 in front of Arbitrator Feldman. The parties continued to negotiate a resolution, but are unable to agree on a mutually agreeable method to select an arbitrator.

On December 17, the Company filed its Complaint. (Doc. No. 1.) The Company also contemporaneously filed an emergency motion to stay the December 22 arbitration. (Doc. No. 2.) The Court held a telephone conference on December 17, during which the Union announced its intention to file a motion to dismiss the Company's complaint. The Union filed its motion to dismiss on December 18. (Doc. No. 5.) The Company filed an opposition on December 21. (Doc. No. 9.) Against this backdrop, this matter is ripe for decision.

II. DISCUSSION

A. Arbitrator Selection

When an employer and a union agree to submit grievances arising from a

collective bargaining agreement to arbitration, the "limited" function of the federal courts is "to ascertain [. . .] whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567-68, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960). Whether a collective bargaining agreement commits a dispute to arbitration, the Supreme Court has held, is a question of arbitrability for the courts to decide. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964). Whether the parties have complied with the procedural requirements for arbitrating the case, by contrast, is generally a question for the arbitrator to decide. *Howsam*, 537 U.S. at 85; *John Wiley & Sons*, 376 U.S. at 556-57. If doubt exists over whether a dispute falls on one side or the other of this line, the presumption in favor of arbitrability makes the question one for the arbitrator. *AT&T Techs., Inc. v. Comm'ns Workers*, 475 U.S. 643, 650-51, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986); *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (recognizing a "liberal federal policy favoring arbitration agreements").

"The 'threshold question' in *John Wiley & Sons*, as in today's case, was 'who shall decide' a series of disputes arising under a collective bargaining agreement--an arbitrator or a judge?" *USW v. St. Gobain Ceramics & Plastics, Inc.*, 505 F.3d 417, 420 (6th Cir. 2007) (citing *John Wiley & Sons*, 376 U.S. at 547); *see also Bell Atlantic v. Comm'ns Workers of America*, 164 F.3d 197, 200 (3d Cir. 1999) ("a threshold question—one that is dispositive of this appeal—is interposed, for when faced with a dispute involving labor arbitration, a federal court must first determine whether resolution of the disagreement is for the court or for an arbitrator to undertake."). Specifically, this case poses the following threshold question: Is the issue of

whether a grievance is before a proper arbitration forum a substantive arbitrability question appropriate for judicial resolution?

The Court has been unable to find Sixth Circuit precedent that directly answers this question, nor have the parties cited to any such authority. A review of decisions of other courts, however, compels the conclusion that the issue is appropriate for judicial determination.

"[A]ny power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties." *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986) (cited with approval in an unpublished decision by *Kennedy v. Uniroyal Pension Plan*, 1991 U.S. App. LEXIS 17444 (6th Cir. July 23, 1991)). The arbitrator "has no independent source of jurisdiction apart from the consent of the parties." *Id.* Moreover, an arbitrator "who is improperly elected has no power to resolve a dispute between the parties." *Bear Stearns & Co. v. N.H. Karol & Associates*, 728 F. Supp. 499, 501 (N.D. Ill. 1989). Similarly, the arbitrator cannot be the judge of his own authority. *International Ass'n of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. General Electric Co.*, 865 F.2d 902, 904 (7th Cir. 1989).

In *United Steel Workers of America v. Saint Gobain*, 505 F.3d 417 (6th Cir. 2007), the Sixth Circuit held that an issue of whether compliance with a time-limitation bar was a procedural "condition precedent to arbitrability" and that the issue should be resolved by an arbitrator and not a district court. The court in *Saint Gobain* clarified that procedural questions "included debates relating to whether the prerequisite steps of a grievance procedure have been followed" relating to "waiver, delay, or a like defense to arbitrability." *Id.* at 421 (citing *John Wiley & Sons*, 376 U.S. at 557, *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25). Contrary to the Union's position, *Saint Gobain* does not compel a conclusion that the arbitrator selection issue posed in this case is not appropriate for judicial resolution. To be certain, some arbitrator

selection issues are merely procedural. *See Dockser v. Schwartzberg*, 433 F.3d 421, 423 (4th Cir. 2006) (holding that the question of the proper number of arbitrators is a procedural question that is inappropriate for judicial intervention).

The Supreme Court has found "questions of arbitrability" to exist only in the

> kind of narrow circumstance where contracting parties would likely have expected a court to decide a gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Howsam v. Dean Witter Reynolds, 537 U.S. 79, 83-84 (2002). *Howsam's* guidance is particularly illuminative here. The question of whether a grievance is before a proper arbitration forum is, in this Court's view, exactly the "kind of narrow circumstance where contracting parties would likely have expected a court to decide a gateway matter." Moreover, it is eminently unreasonable for the parties to have expected that an arbitrator would decide a question of whether that arbitrator was properly selected or appointed under the CBA.[2] An alternate holding could lead to ludicrous results. If this Court were to hold that an arbitrator could decide a question of whether he was properly selected, there would be no judicial recourse to prevent a company, or a union, from conducting an arbitration hearing in front of a company owner, or a union leader, or Santa Claus for that matter, despite contrary language in the governing agreement.

Therefore, the Court adopts the position that the question of whether a grievance is before a proper arbitration forum, or its converse, whether an arbitrator has the power to arbitrate a particular grievance, is a substantive question of arbitrability that is highly appropriate for judicial determination.

[2] Leaving aside the serious conflict of interest issues that would arise if an arbitrator were asked to pass judgment on the propriety of his own selection, Feldman's statement in this case that "[a]rbitrability will be determined at the hearing" is a statement that runs contrary to a wide swath of Supreme Court precedent. (Doc. No. 1-11.)

B. Expedited Arbitration Proceedings

In addition to its objection to the procedure used to select Feldman as the arbitrator, the Company submits that it will not agree to the AAA expedited arbitration procedures referenced in paragraph D of the CBA, *supra*. Despite seemingly clear language stating "[c]ases involving discharge shall be processed through AAA expedited arbitration procedures," the Company argues that the "past practice" between it and the Union allow the avoidance of the CBA language. (Doc. No. 1 at ¶ 13.) In support, it offers six examples of employee discharges where expedited arbitration procedures were not used. (Doc. No. 1 at ¶ 13 n.2.) At the outset, it appears that five of the six examples offered by the Company predate the current CBA, and the sixth involves an employee, Ira Hood, whose case was settled and never arbitrated. (*Id.*)

Leaving aside the issue of whether the past practice evidence provided by the Company is even relevant to the issue, it is clear that, unlike the Court's conclusion as to the arbitrator selection issue, questions involving whether "a dispute will be resolved through arbitration *procedure* A or arbitration *procedure* B" are procedural questions. *Bell Atlantic-Pennsylvania v. Communication Workers, Local 13000*, 164 F.3d 197, 203 (3d Cir. 1999) (emphasis added). In *Bell Atlantic*, the Third Circuit held that an action where an employer sought "a declaratory judgment that [a dispute] could only be submitted to the expedited arbitration procedure" posed a procedural arbitrability question. *Id.* at 202. This inquiry is "much broader" than the basic substantive arbitrability question, which asks only "whether or not the company was bound to arbitrate." *Id.* at 199.

As discussed below, while the Court need not reach the question of whether past practice between the Company and the Union have altered or waived the clear language of the

CBA, the Court notes that it finds the underlying question as to whether the proper procedure to be followed is expedited or regular functionally indistinguishable "from those cases in which the parties agree that an underlying dispute is arbitrable, but disagree about the effect of laches, waiver, exhaustion of pre-arbitration steps, limitations periods, or other 'procedural' issues." *Id.* at 203.

C. The Court's Power to Grant the Relief Requested

Despite the Court's conclusion that the ultimate issue of whether a grievance is before a proper arbitration forum is a question of arbitrability, the Union argues that this Court is constrained by the provisions of the Norris LaGuardia Act and therefore lacks the jurisdiction "to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions" of the Act. 29 U.S.C. §§ 101 et seq.[3] The Court agrees.

"To apply the Norris-LaGuardia Act, we have only to know whether arbitration of a labor dispute is a matter 'involving or growing out of a labor dispute'. It does not require deep insight to understand that the answer is 'yes.' Thus the statute applies, and district courts may not issue injunctions." *AT & T Broadband v. IBEW*, 317 F.3d 758, 760 (7th Cir. 2003). The court in *AT & T Broadband* soundly rejected the argument that an injunctive remedy is available to an employer seeking to vindicate its substantive right to a judicial decision about arbitrability. *Id.* at 761 (holding that allowing injunctive relief would mean "Bye, bye, Norris-LaGuardia Act"). "What Congress established through the Norris-LaGuardia Act is that a substantive right does *not* imply an injunctive remedy. Employers have to settle for damages or other forms of *ex post*

[3] Though the Company has brought its action in the form of an emergency motion to stay the arbitration hearing, it is clear that courts properly treat such motions as seeking injunctive relief. *See, e.g., Garner Lumber Co. v. Randolph E. Valensi, Lange, Inc.*, 513 F.2d 1171, 1172 (4th Cir. 1975) (treating a stay order as "analogous to an injunction").

review, even if they turn out to be less effective at vindicating the underlying right." *Id.* (emphasis in original).

Moreover, although the Supreme Court has stated that arbitration will not be *compelled* by a federal court unless a prior determination as to arbitrability is made by a district court, the Supreme Court has not stated or implied that an arbitration proceeding should be *enjoined* until a determination as to arbitrability is made. *Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union*, 425 F.3d 938, 952 (11th Cir. 2005); *see also Lukens Steel Co. v. United Steelworkers of America*, 989 F.2d 668, 679 (3d Cir. 1993).

Therefore, this Court adopts the reasoning of the Seventh, Eleventh, and numerous other Circuit Courts and holds that it does not have jurisdiction to enjoin arbitration of this labor dispute. *See Triangle Construction*, 425 F.3d at 940, and cases cited therein. The *Triangle Construction* court found that neither the Supreme Court nor any of the circuit courts has held that there is an exception to the Norris-LaGuardia Act under which a court has jurisdiction to enjoin or stay arbitration proceedings,[4] 425 F.3d at 948; *see also Pritchard Electric Co. v. International Brotherhood of Electrical Workers*, 306 F. Supp. 2d 603, 607 (S.D. W.Va. 2004) ("five courts of appeals have concluded that the [Norris-LaGuardia Act] deprives district courts of the authority to issue an injunction halting a pending arbitration that arises from the labor context.")

Constrained by precedent, it is clear that this Court must deny the Company's

[4] Even if the Norris-LaGuardia Act did not stand in the way of this Court granting the Company's requested relief, the Court would still find such a request lacking because the Company has failed to show the threat of irreparable injury. In support of its request for injunctive relief, the Company states "[w]ithout a temporary injunction to decide the propriety of this process, Tamarkin will be forced to appear before an arbitrator […]." (Doc. No. 9, Pl. Resp. at 12.) However, "[c]ourts have ordinarily not deemed litigation expense to be substantial and irreparable injury warranting an injunction." *Tejidos de Coamo, Inc v. Int'l Ladies' Garment Workers' Union*, 22 F.3d 8, 23 (1st Cir. 1994) (finding no irreparable harm to warrant a stay of an arbitration.) *See AT & T Broadband*, 317 F.3d at 762 ("All AT & T could lose from the delay is the cost of presenting the arguments to the arbitrator, and it has long been established that the expense of adjudication is not irreparable injury.")

emergency motion to stay the December 22 arbitration. Indeed, even though a district court "has no jurisdiction to stay the arbitration while it considers any arbitrability questions issues raised by the parties," the court in *Triangle Construction* explicitly instructed that "[n]othing in our discussion of this case should be construed to mean that a court may not address questions of arbitrability prior to arbitration proceedings, or while those proceedings are ongoing." As discussed above, the Company's complaint poses a question of substantive arbitrability that this Court, at an appropriate time and in an expedited manner, will decide. Upon reflection and consideration of the parties' forthcoming briefs in this matter, time will tell whether today's Union victory will prove a pyrrhic one.

III. CONCLUSION

For the foregoing reasons, the Company's emergency motion to stay the December 22 arbitration is **DENIED** and the Union's motion to dismiss the Company's complaint is also **DENIED**. The Court declines to rule at this time on the Union's motion for expedited discovery, and will discuss that motion during the Case Management Conference, to be held forthwith in a date to be established by a separate order filed contemporaneously with this Memorandum Opinion.

IT IS SO ORDERED.

Dated: December 21, 2009

HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE